No. 08-1151

In the Supreme Court of the United States

STOP THE BEACH RENOURISHMENT, INC.,
Petitioner,
v.
FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND, WALTON COUNTY, AND CITY OF DESTIN,
Respondents.

On Writ of Certiorari to the Florida Supreme Court

BRIEF FOR RESPONDENTS WALTON COUNTY AND CITY OF DESTIN

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QUESTIONS PRESENTED

1. Whether any federal question other than the claim that the Florida Supreme Court committed a "judicial taking" under the Takings Clause of the Federal Constitution was pressed or passed on in the Florida Supreme Court, and hence is cognizable under 28 U.S.C. § 1257.

2. Whether the Florida Supreme Court's resolution of questions of Florida property law in this case lacked fair support in prior Florida law.

3. Whether, assuming the Florida Supreme Court's exposition of Florida property law had no fair support, this gave rise to a cause of action under the Takings Clause.

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BRIEF FOR RESPONDENTS WALTON COUNTY AND CITY OF DESTIN

STATEMENT

This case arises out of a state administrative proceeding authorizing restoration of a critically eroded Florida beach. Petitioner argued in the state courts that the Florida statute governing beach restorations, by adopting a fixed boundary line between its members' property and the State's sovereign submerged land, was a taking of certain riparian property rights under Florida constitutional law. The Florida Supreme Court rejected these state law claims, finding that the Florida legislature had good cause to adopt a fixed property boundary as part of a beach restoration project, and that no established riparian property rights had been taken.

Petitioner now seeks to convert this state law dispute into a federal constitutional controversy, by asserting the Florida Supreme Court "radically" and "dramatically" changed the Florida law of riparian rights, thereby perpetrating a "judicial taking." The claim that the Florida court engaged in unprincipled revisionism of state law is unsupportable. But even if the Florida court had changed state property law in a way that lacks fair support in prior Florida law, petitioner can claim no taking under the Federal Constitution. The beach restoration project did not take an inch of its members' land; it provided critical new protections against storm damage; and it expressly preserved all upland owners' rights of view, access, and use of the waters. The Takings Clause protects against *takings* of private property without just compensation; it does not compel the State to transfer to private claimants ownership over a new strip of

beach constructed by the State on state land at taxpayer expense.

A. Public And Private Rights In Tidal Lands In Florida

The State of Florida, like other States, owns as sovereign the land beneath its coastal tide waters. This Court has held that all questions about the boundary between state-owned tidal lands and private uplands, and the respective rights of public and private property owners, are governed by state law. In *Shively* v. *Bowlby*, 152 U.S. 1 (1894), the Court reviewed these issues comprehensively, concluding that "there is no universal and uniform law upon the subject; * * * each state has dealt with the lands under the tide waters within its borders * * * as it considered for the best interests of the public." *Id.* at 26. The modern Court has reaffirmed this understanding. See *Phillips Petroleum Co.* v. *Mississippi*, 484 U.S. 469, 473-476 (1988) (state law controls in determining public trust obligations on tidal lands); *Oregon* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378-381 (1977) (state law controls in resolving title disputes regarding submerged sovereign lands).

In Florida, the landward boundary of state tidal lands has traditionally been the "mean high water line" (MHWL).[1] The State holds title to all land seaward of this line; upland property is variously subject to private or public ownership. Florida's public tidal lands are held by the Board of Trustees of the Internal Improvement Trust Fund, "in trust for all the people." Fla. Const. art X, § 11.

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[1] Florida defines the mean high water line to be the average height of the high tide over a 19-year period. Fla. Stat. §§ 177.27(14), 177.27(15).

As a boundary, the MHWL is inherently unstable or dynamic. It fluctuates over time as alluvial deposits augment the shoreline or the action of the elements erodes it away. Florida, like most legal systems, recognizes a basic distinction between changes in the MHWL that are gradual and imperceptible, and changes that are sudden and perceptible.[2] Gradual and imperceptible augmentations of shoreline are called "accretion," see *Bd. of Trs. of the Internal Improvement Trust Fund* v. *Sand Key Assocs., Ltd.*, 512 So. 2d 934, 936 (Fla. 1987); gradual and imperceptible subtractions are called "erosion." Pet. App. 21. Accretion and erosion cause the location of the MHWL to change. Accretion increases the amount of land belonging to upland owners while erosion reduces it.

An "avulsion" occurs when a sudden and perceptible change causes a "loss of or addition to land by the action of water or a sudden change" in the shoreline. *Sand Key*, 512 So. 2d at 936. Avulsion causes the MHWL to change in fact, but does not result in a change in the legal boundary, which remains where the MHWL was located before the avulsive change occurred. See *Bryant* v. *Peppe*, 238 So. 2d 836, 837-839 (Fla. 1970). In effect, an avulsion transforms a dynamic boundary defined by the MWHL into a fixed boundary defined by the pre-avulsion MHWL.

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[2] "The test as to what is gradual and imperceptible is, that though witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on." *Bd. of Trs. of the Internal Improvement Trust Fund* v. *Medeira Beach Nominee, Inc.*, 272 So. 2d 209, 211 (Fla. Dist. Ct. App. 1973).

The doctrines of accretion, erosion, and avulsion also apply to artificial events caused by the State. Florida law makes clear that the doctrine of accretion does not apply when an upland owner artificially causes additions to her land. *Sand Key*, 512 So. 2d at 938. The State, in contrast, traditionally has been allowed to engage in a variety of construction projects on sovereign submerged lands deemed to be in the public interest. See *Medeira Beach*, 272 So. 2d at 211 (discussing groins built by state along shore in front of private property as "lawful exercise of the police power by a municipality to prevent beach erosion"). When the State causes accretion, the upland owner gains title to the newly formed land as she normally would. See *id.* at 212-214. When the state causes avulsion, however, the boundary becomes fixed at the pre-avulsion MHWL, and the state retains title to any new dry land created seaward of the boundary. *Bryant*, 238 So. 2d at 838-839 (citing *Martin* v. *Busch*, 112 So. 274, 288 (Fla. 1927) (State-caused avulsion resulted in state-owned, new dry land below the original high water mark)).

B. The Beach And Shore Preservation Act

Florida's 825 miles of sandy beaches fronting on the Atlantic Ocean and the Gulf of Mexico have been repeatedly damaged by hurricanes and seasonal storms. The state legislature has declared that "beach erosion is a serious menace to the economy and general welfare of the people of this state and has advanced to emergency proportions." Fla. Stat. § 161.088.

The Beach and Shore Preservation Act, originally enacted in 1965, provides for the protection of Florida's tidal shore lands. The provisions of the Act at issue in this case, which were adopted in substan-

tially their present form in 1970, provide a mechanism for financing and carrying out beach restoration and renourishment projects[3] on beaches that have been designated as critically eroded. (Relevant provisions of the Act are reproduced in Appendix A, *infra*.) The "whole purpose" of beach restoration "is to provide protection to the upland properties" by providing a buffer against future storm damage. J.A. 76. The protected upland properties in this case include 448 parcels occupied by privately-owned homes and condominiums, see J.A. 192, 201, as well as publicly-owned walkovers that allow public access to the beach, public parks, and Scenic U.S. Highway 98, which also serves as a hurricane evacuation route.

Authority to approve a beach restoration project is divided between the Department of Environmental Protection (DEP) and the Board of Trustees. The DEP must examine the environmental impact of the proposed project and approve any dredging of sand from sovereign submerged land. These issues are resolved under a single application that results in the issuance of a Joint Coastal Permit. J.A. 143. The Board is required to determine and record a boundary line, called the Erosion Control Line (ECL), between the state sovereign lands and upland properties in the area where the restoration will occur. Fla. Stat. § 161.141.

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[3] The Act defines "beach restoration" to mean "the placement of sand on an eroded beach for the purposes of restoring it as a recreational beach and providing storm protection for upland properties," Fla. Stat. § 161.021(4), and "beach nourishment" to mean "the maintenance of a restored beach by the replacement of sand." *Id.* § 161.021(3). The project challenged in this case was a beach restoration (J.A. 99), and we will generally refer to it as such.

The Act declares "that there is no intention on the part of the state to extend its claims to lands not already held by it or to deprive any upland or submerged owner of the legitimate and constitutional use and enjoyment of his or her property." *Ibid.* Accordingly, the Act directs the Board in locating the ECL to "be guided by the existing line of mean high water." *Id.* § 161.161(5). Where the project requires a taking of private property, for example if the ECL must be located upland from the existing MHWL, the statute directs the requesting authority to acquire the needed property by eminent domain. *Id.* § 161.141.

The survey undertaken by the Board establishes not only the ECL but also other dimensions of the project, including the width of the restored beach, dune elevation, and beach profile. *Id.* §§ 161.161(3), 161.161(1)(c). Once the survey is completed, notice of the survey is provided by publication and by mailing copies to each riparian owner of record of upland property lying within 1000 feet of the proposed beach restoration. After a public hearing, the Board may adopt a resolution approving the survey and the ECL. *Id.* § 161.161(4), (5). Once any judicial challenges are resolved, the survey is recorded. *Id.* § 161.181.

The reason for adopting a fixed boundary line and recording the survey is that the Act establishes a series of public commitments defined in relation to the ECL and the survey. Cumulatively, these commitments provide significant benefits to upland property owners. If substantial erosion occurs upland of the ECL, the Board, acting either on its own or on petition by upland owners, can direct the responsible agency to restore the beach "to the extent provided

for in the board of trustees' recorded survey." Fla. Stat. § 161.211(3). The State may not extend the portion of the beach lying seaward of the ECL "beyond the limits set forth in the survey," unless the State obtains the written consent of all upland owners "whose view or access to the water's edge would be altered or impaired." *Id.* § 161.191(2). The State may not allow any structure, other than one designed to prevent erosion, "to be erected upon lands created, either naturally or artificially, seaward of any" ECL fixed by survey. *Id.* § 161.201. It may not permit any use of the reconstructed beach which may be "injurious to the person, business, or property of the upland owner or lessee." *Ibid.* Finally, if for any reason the State fails to commence a beach restoration project within two years of the recording of the ECL, or suspends a restoration project for more than six months once it has started, upland owners abutting a majority of the ECL can petition the Board to cancel it and restore the common law boundary—the MHWL. *Id.* § 161.211(1).

In addition to these very substantial public commitments, the Act contains an express "[p]reservation of common-law rights." Fla Stat. § 161.201. Any upland owner or lessee who ceases to own to the MHWL, because of the substitution of the ECL for the MHWL, nevertheless continues to be entitled to common law riparian rights, "including but not limited to rights of ingress, egress, view, boating, bathing, and fishing." *Ibid.* The only exception is that "the common law shall no longer operate to increase or decrease the proportions of any upland property lying landward" of the ECL, "either by accretion or erosion or by any other natural or artificial process." *Id.* § 161.191. The suspension of future increases or decreases in upland property is logically entailed by

the creation of a fixed boundary line between sovereign lands and uplands. This is confirmed by an exception to the exception: If the agency responsible for the reconstructed beach allows the shoreline to recede to a point landward of the ECL, then the common law of accretion and erosion is restored. *Id.* § 161.211(2).

The Act provides for public funding of beach restoration and renourishment projects. For beaches that have been determined to be critically eroded, the State is authorized to pay up to 75 percent of the cost of the project; the balance is paid through cost sharing by the local government sponsor and sometimes with funds from the federal government. Fla. Stat. § 161.101(1)-(5). Although local governments may collect special assessments from littoral property owners to defray a portion of the costs, no such assessment was imposed in this case.

Since it was adopted, the Act has been used on 45 separate projects to restore approximately 175 miles of Florida beaches. J.A. 82.

C. Proceedings Below

The Destin/Walton County Beach, located in the western Panhandle of Florida, is one of the finest white sand beaches in the State. J.A. 132. The beach was critically eroded by Hurricane Opal in 1995. J.A. 30. Walton County and the City of Destin, respondents herein, entered into a series of conferences with the Department about how to address the problem. On July 30, 2003, respondents applied for a Joint Coastal Permit to undertake a beach restoration project under Act.

The proposed project covered 6.9 miles of beach, located partially in Walton County and partially in

the City of Destin (which is in Okaloosa County). Sand for the restoration project was to be taken from a borrow area located offshore. The sand would be disturbed by a cutter dredge, vacuumed into a pipeline for delivery to the restoration area, after which it would be spread out by bulldozer. J.A. 108-110.

The restored beach was designed to have greater width and higher elevation than the pre-storm beach. J.A. 28-29. The project also called for dune restoration on property upland from the ECL. J.A. 218-219. Upland filling would be accomplished by obtaining construction easements from consenting upland owners. J.A. 173-174, 192. Testimony at the administrative hearing explained that the purpose of enlarging the beach during the restoration process was to prevent future anticipated erosion. J.A. 80-82. The extra sand was described as "sacrificial sand," which has a life expectancy of "six to eight years." J.A. 81. After the beach erodes back to the "storm protection" design, beach renourishment will be used to maintain it in that state. J.A. 81. One witness acknowledged that because the restored beach would be wider and higher than the pre-storm beach, it would cause the MHWL to shift seaward relative to the pre-storm MHWL. J.A. 89. Thus, the project, at least initially, would create a new strip of dry sand beach between the ECL and the new MHWL. J.A. 179, 223.

On July 15, 2004, the DEP issued its Notice of Intent to award the Joint Coastal Permit. J.A. 27-41. Petitioner Stop the Beach Renourishment (petitioner or STBR), an association of six property owners owning five parcels of littoral land, along with a second group, Save our Beaches, Inc. (SOB), filed a Petition for Formal Administrative Proceedings, challenging

the Department's Notice. The petition set forth 38 "issues of ultimate fact" which STBR and SOB alleged were in dispute, most of which concerned environmental impacts. Subsequently, STBR filed a petition challenging the Walton County ECL. Among petitioner's claims was that "the Department has not properly identified the location of the mean high water line on the Destin/Walton County Beach." J.A. 20. The petitions were consolidated for adjudication in a single proceeding before an Administrative Law Judge (ALJ).

During September and October 2004, more hurricanes hit Florida, including Hurricane Ivan, which caused further damage to the Destin/Walton County Beach. Pet. App. 4 n.4. In light of this development, STBR and SOB agreed to "abandon their challenge to the beach-related technical aspects" of the draft permit and the Walton County ECL. J.A. 53. Included among the abandoned claims were all challenges to the location of the ECL. The amended petition was pared down to four issues: whether the project complied with water quality standards, whether Destin and Walton County had established the requisite upland interest necessary to obtain a permit, and two questions about whether the project would take constitutionally protected riparian rights. J.A. 61.

In late 2004, while the administrative proceedings were still pending, petitioner and several private property owners filed a lawsuit in the Florida Circuit Court in Leon County, seeking a declaratory judgment that the Florida Beach and Shore Preservation Act is unconstitutional under the Takings and Due Process Clauses of both the Florida and the Federal Constitutions. (The amended complaint is

reproduced in Appendix B, *infra*.) When respondents brought this action to the attention of the ALJ, STBR and SOB conceded that the agency had no authority to decide the constitutional issues. The ALJ accordingly dismissed the constitutional claims from the administrative proceeding.

At this point, only the two nonconstitutional claims remained for administrative determination. An oral hearing on these issues was held on June 7, 2005. See J.A. 64-251. On June 30, 2005, the ALJ issued a Recommended Order approving the project. Pet. App. 101-135. The ALJ determined that respondents did not have to show upland interest, because under the applicable administrative rules, a public entity need show only that the project does not "unreasonably infringe on riparian rights." Pet. App. 122-123, quoting Fla. Admin. Code Rule 18-21.004(3). The ALJ found that the project would not unreasonably infringe on any of petitioner's members' riparian rights. The Secretary of the DEP adopted the ALJ's proposed order and findings, including the determination that no riparian rights would be unreasonably infringed. Pet. App. 88-100.

Motions to stay the DEP's Final Order granting the permits were denied by the DEP and the Florida District Court of Appeals (J.A. 274), and respondents commenced the beach restoration project.

When STBR and SOB appealed the administrative order to the District Court of Appeals, they abandoned any challenge to the permit on environmental or statutory grounds. Instead, relying on Florida authority allowing constitutional challenges to administrative action to be brought on judicial review, see *Key Haven Associated Enterps., Inc.* v. *Bd. of Trs. of the Internal Improvement Trust Fund*, 427

So. 2d 153, 156-158 (Fla. 1983), the only argument STBR and SOB advanced on the merits was that the beach restoration project was a taking of riparian rights under Florida constitutional law.[4] STBR and SOB explained that this was an "as-applied" constitutional challenge, in contrast to the challenge then pending before the Circuit Court in Leon County, which they characterized as a "facial" challenge to the Act.

The District Court of Appeals, in a decision filed April 28, 2006, agreed that the Act was unconstitutional as applied to petitioner's members. Pet App. 61-87. Citing only Florida authorities, the court found that riparian rights are property rights which cannot be taken without compensation; that these rights include the right to receive accretions and have property's contact with the water remain intact; and that these rights "were eliminated by the Department's final order." Pet. App. 80. The court also expressed doubt as to whether the Florida legislature had the authority to define the boundary between uplands and sovereign land with a fixed ECL as opposed to a dynamic MHWL. Pet. App. 83-85.

The court accordingly reversed the DEP's order approving the Joint Coastal Permit; remanded to the DEP with instructions to "provide satisfactory evidence of sufficient upland interest"; and declared "invalid" the Board of Trustees' recorded survey to the extent it showed "a boundary of STBR's members' property that is different from their deeds." Pet.

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[4] Another issue was whether STBR and SOB had satisfied Florida associational standing requirements. Pet. App. 73. The court upheld STBR's standing, but denied standing to SOB. *Id.* at 75. SOB thereafter dropped out of the litigation.

App. 86-87. The court observed that Fla. Stat. § 161.141 calls for the exercise of eminent domain when a project "cannot reasonably be accomplished without the taking of private property," but it acknowledged that "whether an eminent domain proceeding will be required or what property would be subject to the proceeding" were issues "not before us in this case." Pet. App. 86 & n.7.

In the meantime, the Circuit Court for Leon County issued an opinion and order on July 20, 2005. Finding that genuine issues of material fact remained unresolved, the trial judge ruled that neither side was entitled to summary judgment. In 2007, the court ordered that case held in abeyance pending further order.

Although the District Court of Appeals declared the Joint Coastal Permit and the ECL invalid, the court agreed to stay its mandate and certified its decision as one of great public importance warranting further review by the Florida Supreme Court. Construction activity on the Destin/Walton County Beach restoration project therefore continued. The Walton County portion of the project was completed on January 19, 2007; the Destin portion was completed on June 24, 2007.[5]

The Florida Supreme Court took jurisdiction of the case, and in an opinion released on September

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[5] Although the completion of the project presumably moots any challenge to the issuance of the permits, petitioner's judicial takings claim is not moot. If petitioner prevails on all its claims, petitioner's members, if they can prove in a separate proceeding that the loss in value of their property exceeds the benefits they obtain from the project, see pp. 52-53 *infra*, would be entitled to an award of just compensation.

29, 2008, quashed the decision of the District Court of Appeals. The court began by rephrasing the certified question, noting that although the District Court of Appeals had described the question as an as-applied challenge, it had "actually addressed a facial challenge." Pet. App. 2. After reviewing various features of common law riparian rights, the court described the ways in which the Florida Act modified the common law, while seeking to preserve the same "careful balance between the interests of the public and the interests of the private upland owners." Pet. App. 26.

The Florida Supreme Court next turned to the specific constitutional objections identified by the District Court of Appeals. With respect to accretion, the court noted that future accretion is a "contingent right," adopted as a "rule of convenience intended to balance public and private interests by automatically allocating small amounts of gradually accreted lands to the upland owner without resort to legal proceedings and without disturbing the upland owner's rights to access to and use of the water." Pet. App. 34. This rationale, the court explained, and the other purposes of the doctrine of accretion identified in prior Florida cases, did not apply in the context of a beach restoration project under the Act, because the Act substituted a fixed boundary for the fluctuating boundary defined by accretion and erosion.

With respect to the right of an upland owner to maintain contact with the water, the court observed that previous decisions had recognized the right of access to the water, but no decision had enforced a right of contact with the water independent of a right of access. Because the Act expressly preserved the right of access to the water, the Act was not facially

unconstitutional for permitting beach restorations that would temporarily insert a new increment of dry sand beach between upland property and the water, thereby eliminating physical contact with the water.

Throughout its discussion of the alleged constitutional infirmities of the Act, the Florida Supreme Court made no reference to the Federal Constitution or to any decision of this or any other court construing the Takings Clause of the Federal Constitution. Only Florida constitutional decisions were cited.

Justices Wells and Lewis separately dissented. Neither dissenting opinion cited any provision of federal law or any federal judicial decision.

Petitioner filed a Motion for Rehearing, Pet. App. 138-170, in which for the first time it advanced a federal constitutional claim: that the Florida Supreme Court had "dramatically chang[ed]" Florida law, resulting in an "uncompensated taking of private property contrary to the United States Constitution." Pet. App. 139. The motion was denied without opinion.

SUMMARY OF ARGUMENT

Petitioner's brief is directed in significant part to issues that are not properly before the Court. Only one federal constitutional claim was even pressed by petitioner in the state courts below: the eleventh-hour argument that the Florida Supreme Court "radically" and "dramatically" changed Florida property law, and in so doing perpetrated a "judicial taking." This novel claim, which has never before been accepted by the Court, should be rejected for several reasons.

A. This Court's jurisdiction over state court judgments under 28 U.S.C. § 1257 extends only to federal

federal questions pressed or passed on below. This case was decided by the Florida courts as a matter of Florida constitutional law. Petitioner turned to the Federal Constitution only after its state-law claims had been rejected by the Florida Supreme Court, filing a petition for rehearing claiming that the Florida court had committed a judicial taking. In these circumstances, the only federal question presented for this Court's review is the judicial taking claim. Petitioner's claims that the Florida Act violates procedural due process and commits a federal taking could have been, but were not, pressed by petitioner below, and were not passed on by the Florida courts. These claims should be dismissed.

B. This Court has never recognized a judicial taking claim. Two elements are minimally necessary. First, it must be shown that the court below interpreted state property law in a way that lacks any fair support in previous law. In effect, this Court must be able to say that the state court decision was so unreasonable the Court must ignore it, and substitute its own understanding of state law, in order to protect federal constitutional rights. Second, it must be shown that the change in state law wrought by the state court, measured against the correct understanding of state law, has such a severe impact on property rights that it constitutes a taking under federal takings jurisprudence. Petitioner cannot satisfy either of these required elements.

Great deference should be accorded state courts in the interpretation of their own law. State courts have a particular advantage in explicating their own property law, especially in the area of riparian rights, which often differ from State to State. If such determinations could be readily challenged as judi-

cial takings, this could stifle needed adjustments in property law over time. It is also unclear whether judicial takings claims could be reviewed anywhere except in this Court. Such review would occur without any framing of the issues below and usually, as here, on an inadequate record.

C. The Florida Supreme Court had more than ample support for its resolution of the property issues in this case. No previous Florida decision had considered whether the Florida legislature, in the context of a beach restoration program, could suspend future accretion and erosion. The Florida court reasonably concluded that this was permissible, given that the substitution of a fixed boundary for the dynamic boundary of the common law rendered accretion and erosion irrelevant. The court also reasonably concluded that no prior Florida decision had recognized a right to physical contact with the water, independent of a right of access to the water, which the Florida Act expressly preserves.

Petitioner's ultimate objective is to maintain the fluctuating MHWL as a boundary for its members' property, which petitioner believes would allow its members to claim the new dry-sand beach between the ECL and the post-restoration MHWL as their own property. This claim is contrary to the common law. The beach restoration was not an accretion; it was an artificial avulsion (and a response to natural avulsion), and hence the project under the common law would have followed the Act in freezing the boundary at the pre-storm MHWL. Petitioner also cannot show that the fluctuating boundary of the common law was ever regarded as a right rather than a convention adopted out of necessity, which the Act eliminates by fixing the boundary and pro-

viding significant commitments that the State will prevent future erosion.

D. Even if petitioner could show that the Florida Supreme Court changed state property law without fair support, the changes in law allegedly produced would not qualify as a taking under federal constitutional law. STBR, the "sole petitioner," owns no property and has never sought any compensation in this case, two required elements for any takings claim. Hence petitioner has no cause of action under the Takings Clause.

Assuming a takings claim is properly presented, petitioner cannot show that the Florida Supreme Court decision has resulted in any invasion of its members' land or diminution of their rights. Petitioner did not challenge the location of the ECL in the administrative proceedings, and so the new boundary of petitioner's members' land must be assumed to be located exactly where the pre-existing MHWL was located. Consequently, the state has not invaded or carved off a single inch of their land. The relevant takings inquiry requires a comparison between the whole parcel owned by petitioner's members before the project and the Florida decision with what they had afterwards. Petitioner's members cannot by sleight of hand claim that the new dry sand beach between the ECL and the post-project MHWL is "their" property which has been taken, since this new beach did not previously exist, and was only created because of the very government project petitioner challenges.

Since no physical invasion or appropriation of land occurred, under relevant federal takings authority any loss of future accretion rights, or of the asserted right to touch the water, must be regarded as

noncompensable consequential damages. Moreover, the Florida Act requires consideration of offsetting benefits in any action for a taking arising out of a beach restoration project. The benefits petitioner's members received—in terms of protection from future erosion and storm damage, as well as preservation of rights and other protections of their interests—far exceed any speculative losses associated with the adoption of a fixed boundary. For these reasons as well, there was as a matter of law no taking.

ARGUMENT

I. NO FEDERAL QUESTION OTHER THAN THE JUDICIAL TAKINGS CLAIM IS PROPERLY PRESENTED.

Review of state court judgments by this Court under 28 U.S.C. § 1257 extends only to federal questions actually decided by the court below. See *Murdock* v. *City of Memphis*, 87 U.S. (20 Wall.) 590, 636 (1874). With rare exceptions, the Court has refused to "consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams* v. *Robertson*, 520 U.S. 83, 86 (1997); see also *Illinois* v. *Gates*, 462 U.S. 213, 217-224 (1983). Under this rule, only one federal question is presented in this case: petitioner's contention that the Florida Supreme Court made an unsupported change in Florida law and in so doing committed a taking of petitioner's members' property under the Federal Constitution.

A. No Procedural Due Process Claim Was Pressed Or Passed On Below

In Part III of its brief, petitioner presents an elaborate argument to the effect that the Florida Act

violates procedural due process because it allows an executive agency to modify a landowner's property boundary without a judicial hearing. Pet. Br. 59-66. This argument is newly minted and was neither presented to nor decided by the Florida courts below.[6]

This is not one of those rare cases in which a state court unexpectedly changes state law in a way that creates a procedural due process violation, for example, by denying a claimant notice or "a meaningful opportunity to be heard." *Boddie* v. *Connecticut*, 401 U.S. 371, 377 (1971); *cf. Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673 (1930). Petitioner does not identify any change in state law wrought by the Florida Supreme Court that might have violated due process. Petitioner's sole claim is that *the Act* violates procedural due process by allowing an executive agency to survey and fix real property boundaries without a prior judicial hearing. See, *e.g.*, Pet. Br. 61-63.

The Act has been on the books since 1970 and was in effect when the Board established the ECL at issue. Had petitioner thought the Act created a due process violation, it could have urged this upon the state courts in this case. This would have given those courts an opportunity to construe the relevant provisions of the Act and evaluate any due process problem. This Court should not serve as the court of first

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[6] Petitioner included a due process claim as one of the questions presented in its certiorari petition, but the short discussion was ambiguous as to whether it was challenging the Act or the decision of the Florida Supreme Court. Pet. 36-39. Now that it is clear that petitioner is challenging *the Act*, it is obvious that petitioner has failed to comply with this Court's Rule 14.1(g)(i) by specifying when this question was raised and passed on in the courts below. See *Adams*, 520 U.S. at 89 n.3.

impression in considering petitioner's procedural due process claim, and it should be dismissed.[7]

B. No Conventional Federal Takings Claim Was Pressed Or Passed On Below

Nor is any federal takings challenge to legislative or executive action presented by this case. Neither the Florida Supreme Court nor the Florida District Court of Appeals made any reference to the Federal

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[7] Petitioner also lacks standing to object to the Act's procedures for setting property boundaries. Petitioner filed a petition for formal administrative proceedings challenging the Board's survey, but it abandoned any claim regarding the location of the ECL before the hearing commenced. See p. 10, *supra*. Petitioner has no standing to object to the procedures governing a claim it has waived.

In any event, petitioner's due process claim fails on the merits. The Act provides for individualized notice and a public hearing on the proposed ECL and the survey. Fla. Stat. § 161.161(4). The Act also contemplates that the Board's resolution adopting the ECL and the survey may be challenged by a petition for formal administrative proceedings under the Florida APA, Fla. Stat. § 120.50 *et. seq*. See Fla. Stat. § 161.181. (The Act originally made this explicit, in Section 161.171, but this section was repealed in 1978 as being redundant with the APA. See Fla. Laws, 1978, c. 78-95.) An administrative hearing on the petition would be a full adjudicatory-type proceeding before an ALJ, allowing for consideration of individualized objections. Fla. Stat. § 120.569. Any final administrative decision is subject to review by the Florida District Court of Appeals. Fla. Stat. § 120.68. The Board's resolution approving the project and the ECL cannot be publicly recorded until such review has been completed, Fla. Stat. § 161.181, and title to land seaward and landward of the ECL does not vest until the ECL is recorded. Fla. Stat. § 161.191(1). Consequently, the statute provides a full and adequate opportunity for individualized objections, subject to judicial review, before the boundaries to individual parcels of littoral land are modified (if at all) by the ECL.

Takings Clause. Neither court framed the takings inquiry in terms of the constitutional doctrine this Court has prescribed for assessing such claims. Indeed, neither court cited a *single* decision of this Court resolving a takings claim under either the Fifth or Fourteenth Amendments. Both courts relied exclusively on Florida judicial decisions in resolving the takings issue.[8] Unquestionably, neither lower court passed on a federal takings claim below.[9]

This Court has observed, "When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, and the aggrieved party bears the burden of defeating this assumption[.]" *Adams,* 520 U.S. at 86-87 (citations omitted). Petitioner has not and cannot overcome this presumption. Petitioner does not specify, as required by this Court's Rule 14.1(g)(i), how it pressed a federal takings challenge to either the Act or the project in the courts below. The petition for rehearing with the Florida Supreme Court included one sentence, in a footnote, asserting that the Act violates the United States Constitution. Pet. App. 141 n.2. However, this Court will generally not consider a question raised for the first time in a petition for rehearing, when the issue is one that could have been raised at an earlier stage in the litigation and the state court denies the petition without comment.

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[8] The Florida Constitution contains a takings clause, Fla. Const. art. X, § 6, which is similar, albeit not identical, to the Federal Takings Clause.

[9] This is not a case where, under *Michigan* v. *Long*, 463 U.S. 1032 (1983), a lower court relies on state law "interwoven" with federal law. *Id.* at 1040-1041. There is no reference to federal law *at all* in the opinions below with respect to the takings issue.

See *Adams*; *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 128 (1945). Petitioner also reproduces an *amicus curiae* brief filed by the Pacific Legal Foundation in the Florida Supreme Court, which urged that the Act violates the Federal Takings Clause. Pet. App. 181-209. Under Florida law, however, it is "axiomatic" that *amici* are not permitted to raise issues not presented by the parties. See *Reichmann* v. *State*, 966 So. 2d 298, 304 n.8 (Fla. 2007).

Tellingly, petitioner does not include excerpts from *its* briefs below. Petitioner's brief in the District Court of Appeal made no reference to the Federal Takings Clause and cited no federal takings cases. In the Florida Supreme Court, petitioner's brief contained only two references to federal takings law, in both contexts urging the court that it was *not necessary* to consider federal authority.[10] See Respondent's Amended Answer Brief at *18, *22, 2004 WL 5482213 (Fla. Nov. 29, 2006).

In an effort to circumvent its failure to challenge state legislative or executive action under federal law below, petitioner seeks in Part II of its brief to assimilate such a challenge to its judicial takings theory. Specifically, petitioner maintains that a federal

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[10] Respondents unsuccessfully urged the Florida courts to consider federal precedents, such as *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978), in order to *reject* the takings claim. See Appellants' Initial Brief on the Merits at *15-*22, 2006 WL 3074093 (Fla. Oct. 20, 2006). In passing on petitioner's state law claims, the Florida Supreme Court obviously was not required to adopt this federal authority as a state rule of decision. Where respondents refer to federal authority in state court, but petitioner presents no federal question, it is "perfectly reasonable" for a state court to conclude that the federal claim was not before it. *Adams*, 520 U.S. at 89.

question is presented because the Florida Supreme Court *failed to invalidate* legislative and executive action as a matter of state law. Thus, petitioner complains that "[b]y changing the boundary line and replacing littoral rights with statutory rights, *the Act*, with the blessing of the Florida Supreme Court, effects a physical taking of STBR's members' property," Pet. Br. 52 (emphasis added), and, "*the Act* (with the Florida Supreme Court's blessing) takes all littoral rights, gives them to the State, and 'replaces' them with inferior statutory rights without paying compensation as contemplated by Florida Statutes section 161.141." Pet. Br. 54 (emphasis added). As should be obvious, petitioner cannot convert a *state* constitutional challenge into a *federal* constitutional challenge by the device of adding that the state violation had the state court's "blessing." If this is sufficient to create a federal question, then every allegedly erroneous state court ruling on a state law question could come to the Court as a federal constitutional question.

C. The Judicial Takings Claim

The only federal question that can be said to have been either pressed or passed on below is the judicial takings claim. Petitioner filed a petition for rehearing with the Florida Supreme Court arguing that the court had violated federal constitutional law by rendering an "unforeseeable change in Florida law," citing in support Justice Stewart's concurring opinion in *Hughes* v. *Washington*, 389 U.S. 290, 298 (1967). Pet. App. 148. Rehearing was denied without opinion. Assuming the Florida Supreme Court did commit a judicial taking, then "[t]he additional federal claim thus made was timely, since it was raised

at the first opportunity." *Brinkerhoff-Faris*, 281 U.S. at 678.

We caution, however, that this is the *only* federal question even plausibly presented in this case. Petitioner can contest as a violation of the Federal Constitution only those alleged impairments of its property rights attributable to an unsupported change in Florida law by the Florida Supreme Court. This narrow point of jurisdiction cannot be used as a bridgehead to introduce other constitutional challenges that were neither pressed nor passed on below.

II. STATE COURT INTERPRETATIONS OF STATE LAW PRESENT NO POSSIBILITY OF A JUDICIAL TAKINGS CLAIM IF THEY HAVE FAIR SUPPORT IN EXISTING STATE LAW.

This Court has never recognized a "judicial takings" claim. The Court has held that an unanticipated interpretation of state law by a state court can give rise to a due process violation. See, *e.g.*, *Bouie* v. *City of Columbia*, 378 U.S. 347, 354-355 (1964); *Brinkerhoff-Faris*, *supra*; *cf. Rogers* v. *Tennessee*, 532 U.S. 451 (2001). But as explained in Part I.A, petitioner does not allege that the Florida Supreme Court's decision created a due process violation; it alleges only that *the Act* violates due process, an issue not pressed or passed on below.

Although there may be extreme circumstances in which it would be appropriate to recognize a judicial takings claim, such cases will be quite rare, and it is certain that nothing in this case would sustain such a claim. Petitioner's brief is elusive about what constitutes a judicial takings claim. At a minimum, we believe, it would have to include two elements. First,

it would be necessary to show that the state court very badly misinterpreted state property law—so badly that a federal court is forced to substitute its own interpretation for that of the state court in order to protect federal constitutional rights. Second, it would be necessary to show that the change in state law produced by the state court decision had such a severe impact on the claimant that it constitutes a taking under the Federal Takings Clause. We address the first requirement—the need to show a very bad misinterpretation of state law—in Parts II and III of this brief. We consider the second requirement—that any change be severe enough to constitute a taking under federal constitutional law—in Part IV.

A. Federal Court Review Of State Court Determinations Of State Law

In a variety of contexts, the protection of federal constitutional rights may require inquiry into the content of state law. See generally H. Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 Colum. L. Rev. 1919 (2003). Perhaps most familiar is the question whether failure to comply with state procedural rules bars consideration of a federal constitutional claim, either on direct or collateral review. See, *e.g.*, *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *NAACP* v. *Alabama*, 357 U.S. 449 (1958).

More germane to the judicial takings claim are situations in which federal constitutional guarantees apply to entitlements, the existence and dimensions of which are governed by state law. Included here are the Contracts Clause, which prohibits the States from passing any law "impairing the Obligation of Contracts," U.S. Const. Art. I, § 10; the Due Process

Clauses, which forbid the government from depriving persons of "property" without "due process of law," U.S. Const. Amends. V & XIV; and the Takings Clause, which states "nor shall private property be taken for public use without just compensation." U.S. Const. Amend. V. Under these clauses, "independent source[s] such as state law" determine whether particular entitlements have been created and what incidents and obligations attach to them. *Bd. of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). Federal constitutional law then determines whether the entitlements recognized by state law should be characterized as "contracts" or "property" for purposes of federal constitutional analysis. See, *e.g.*, *Gen. Motors Corp.* v. *Romein*, 503 U.S. 181, 187 (1992) (Contracts Clause); *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 757 (2005) (procedural due process); *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 164-165 (1980) (Takings Clause); Monaghan, 103 Colum. L. Rev. at 1935-1947.

No issue is presented in this case as to whether the entitlements petitioner alleges its members lost because of the Florida Supreme Court decision should be characterized as "property" for federal constitutional law purposes. See pp. 45-46 & note 14, *infra*. The question, rather, is whether these entitlements once existed as a matter of Florida law and were improperly taken away by the Florida Supreme Court's decision. On *that* question—whether particular entitlements exist under state law—state court judgments warrant the greatest deference.

There are several reasons why opening the door to federal court review of state interpretations of state property law would be undesirable. First, state courts are much more likely to be familiar with state

property law than are federal courts. Wide variations exist among the States in their understanding of property rights associated with riparian lands. See *Port of Seattle* v. *Or. & Wash. R.R.*, 255 U.S. 56, 64 (1921); *Shively* v. *Bowlby*, 152 U.S. at 17-40. State courts will be more attuned to these differences, and have a comparative advantage relative to federal courts in explicating their own property systems.

Second, some flexibility is desirable in interpreting state property law. Property rights systems are not static, but undergo a process of adjustment and refinement over time. See H. Demsetz, *Toward a Theory of Property Rights*, 57 Am. Econ. Rev. 347 (1967). State courts play a critical role in recognizing and defining the dimensions of property rights. If every state court decisions disappointing property owners could be readily challenged as a judicial taking, there would be significant risk of inhibiting the natural evolution and refinement of this law. See *Rogers* v. *Tennessee*, 532 U.S. at 461.

Third, it is frequently difficult to judge the status of property law from a single state appellate decision. The meaning and significance of state court decisions are often open to dispute, especially when assessed by those who are not regular participants in the judicial system. *Cf. Demorest* v. *City Bank Farmers Trust Co.*, 321 U.S. 36, 41-43 (1944). Decisions authored by different judges at different times complicate extracting the "rule" a state court has announced—or has supposedly repudiated.

These pragmatic considerations have long discouraged the Court from reviewing allegedly erroneous interpretations of state law. See *Dugger* v. *Adams*, 489 U.S. 401, 410 (1989). Were its practice otherwise, "every erroneous decision by a state court on

state law would come [to this Court] as a federal constitutional question." *Engle* v. *Isaac*, 456 U.S. 107, 121 n.21 (1982) (alteration in original; citation omitted).

Furthermore, if allegedly erroneous state judicial rulings can themselves establish the predicate for a takings challenge, it is unclear whether review of such a challenge could occur anywhere except in this Court. An action for compensation in the lower state courts would likely be futile, because the lower courts would not regard themselves at liberty to characterize a decision by a superior court as a taking. And an action challenging the decision of the state court in a federal district court under 42 U.S.C. § 1983 might be barred by the preclusion statute, 28 U.S.C. § 1738, see *San Remo Hotel* v. *City and County of San Fransisco,* 545 U.S. 323 (2005), or by the *Rooker-Feldman* doctrine.

Direct review by this Court is also problematic. As this case illustrates, judicial takings claims almost by definition will not be raised and ruled on below, unless the state court writes an opinion on rehearing. Consequently, the Court will lack the benefit of any lower court decision framing the issues for review. Moreover, often, as here, there will be no factual record generated by the state courts that would allow a meaningful evaluation of such a claim. As Justice Scalia has observed, "[i]t is beyond our power—unless we take the extraordinary step of appointing a master to conduct factual inquiries—to evaluate [a judicial] takings claim." *Stevens* v. *City of Cannon Beach*, 510 U.S. 1207, 1335 (1994) (dissenting from denial of certiorari); see also *Adams*, 520 U.S. at 90-91.

B. The Standard Of Review

Given the paucity of precedent in this area, it is also unclear what the appropriate standard of review should be for assessing a state court's interpretation of state law as the predicate for evaluating a judicial taking claim.

Petitioner urges a standard based on Justice Stewart's concurring opinion in *Hughes* v. *Washington*, 389 U.S. 290, 296 (1967), asking whether the state court decision is "sudden," "unpredictable," or "dramatic." Pet. Br. 50. But this focuses exclusively on fair warning. Notice and fair warning are relevant to a procedural due process challenge, but we stress again that petitioner has not challenged the Florida Supreme Court decision on due process grounds. The suddenness of a change does not necessarily suggest that the change is unprincipled. Even in the due process context, this Court has suggested that the change must not only be "unexpected" but "*indefensible* by reference to the law which had been expressed prior to the conduct in issue," *Rogers* v. *Tennessee*, 532 U.S. at 462 (quoting *Bouie* v. *City of Columbia*, 378 U.S. at 354) (emphasis added).

The standard this Court has applied most often in different contexts asks whether the state court determination of state law had "fair support" in preexisting legal authorities. *Demorest*, 321 U.S. at 42; see Monaghan, 103 Colum. L. Rev. at 1960-1964. This was the standard applied in *Demorest* and *Broad River Power Co.* v. *South Carolina*, 281 U.S. 537, 540-541 (1930), two decisions which, if they arose today, might be framed as judicial takings claims. A decision lacking any fair support will ordinarily be both unpredictable and unprincipled. We therefore proceed on the assumption that "fair sup-

port" is the proper standard of review to apply in determining whether the Florida Supreme Court misinterpreted Florida law so badly that it created the possibility of a judicial taking.

Context is important, however, in applying any standard of review. At noted in Part II.A, there are powerful reasons for deferring to state court determinations of the content and dimensions of property rights under state law. Also, most of the decisions invoking the fair support standard involve claims that state law has been manipulated to evade a federal constitutional right set up below. See, *e.g.*, *Howlett* v. *Rose*, 496 U.S. 356 (1990); *Ward* v. *Bd. of Cty. Comm'rs*, 253 U.S. 17, 22 (1920). Here, no federal claim was raised below; the only alleged federal constitutional violation is the one said to have arisen from the asserted misinterpretation of state law itself. Where there is "no question of evasion of the constitutional issue," *Fox River Paper Co.* v. *Railroad Comm'n*, 274 U.S. 651, 655 (1927), the fair support standard should be applied with an extra measure of deference.

The initial question, then, is whether the Florida court's characterization of the littoral rights enjoyed by petitioner's members prior to the implementation of the Florida Act in the Destin/Walton County Beach restoration project lacked fair support in previous Florida law. Only if the decision lacks fair support in prior law would it be necessary to move to the next question, which is whether this interpretation of state law had consequences for petitioner's members so severe that it constitutes a taking of their property under the Federal Takings Clause.

III. THE FLORIDA SUPREME COURT'S DECISION HAD MORE THAN FAIR SUPPORT—IT DID NOT CHANGE FLORIDA LAW IN ANY SIGNIFICANT RESPECT AT ALL.

Even if it is possible for state courts to render interpretations of state law so lacking in support to establish the predicate for a federal takings claim, nothing approaching that kind of revisionism occurred here.

Petitioner levels its charge of unprincipled change primarily at two aspects of the Florida Supreme Court's decision: its discussion of the common law of accretion and its holding that there is no riparian right to maintain contact with the water. Petitioner's ultimate objective, however, is to obtain a ruling that Florida cannot replace the common-law boundary of littoral lands—the dynamic MHWL—with a fixed boundary in the same location—the ECL.

A. Future Accretion

Petitioner has claimed throughout this litigation that the Act violates Florida constitutional law by taking its members' right to future accretions. In this Court, the claim has mutated into the contention that the Florida Supreme Court violated federal constitutional law by recharacterizing accretion as a "contingent" rather than a "vested" right. Pet. Br. 28-31. No prior Florida decision, however, had ever considered whether the legislature could suspend future accretion in the context of a statute that simultaneously eliminates the risk of future erosion, as the Florida Act does. Fla. Stat. § 161.191(2).

As to the question before it—whether the legislature could simultaneously suspend future accretion

and erosion—the court's entirely sensible answer was that this was permissible, because the adoption of a fixed boundary line renders the concepts of accretion and erosion *irrelevant*. Pet. App. 34. Accretion and erosion only apply when the boundary between upland and sovereign lands gradually shifts back and forth due to additions and subtractions caused by the actions of the waters. Once a boundary is fixed, these concepts have no significance.

There is nothing here that even suggests judicial revisionism. The court recognized the common law doctrine of accretion; the court recognized that the legislature had suspended the common law doctrine; the court explained why this was the only sensible thing to do under the circumstances.

Petitioner nevertheless contends that the Florida Supreme Court changed the law when it characterized accretion as a "contingent, future interest," see Pet. App. 20, whereas previous decisions had spoken of a "vested right" to accretion. But whether land acquired by accretion is vested or contingent is entirely a matter of temporal perspective. As to accretion that has occurred in the past, the land gained by alluvial action is clearly what can be called a vested right. The land belongs to the upland owner; any attempt to seize or transfer it to another could be enjoined, unless the taking was effectuated by a legitimate exercise of eminent domain. As to potential future accretion, the right is obviously contingent, in the ordinary meaning of something that may never happen. In this sense, it is entirely appropriate to speak of accretion that has not yet occurred as a "contingent, future interest."

Moreover, petitioner can point to no previous Florida Supreme Court decision actually holding that

there is a vested right to *future* accretion. Petitioner relies principally on *State* v. *Florida National Properties, Inc.*, 338 So. 2d 13 (Fla. 1976), but the question there was whether the Florida legislature could adopt a fixed boundary line on fresh water lakes between riparian and sovereign submerged lands that would *retroactively eliminate* rights to land previously acquired by upland owners by reliction (drainage). The retroactive elimination of rights to land previously acquired is obviously a far different matter than the prospective suspension of gains and losses of land, which are necessarily uncertain and speculative.[11]

In short, no credible claim can be made that the Florida Supreme Court resolved the state law claim regarding the suspension of accretion and erosion under the Act by re-writing the law of accretion in an unprincipled manner.

B. Contact With The Water

Petitioner also insists that Florida law previously recognized a riparian right to maintain contact with the water, and that the Florida Supreme Court engaged in revisionism by denying the existence of this right. The sole support for this claim is the statement, italicized below, in the following passage from *Board of Trustees* v. *Sand Key Associates., Inc.*:

> Riparian and littoral property rights consist not only of the right to use the water shared by the public, but include the following

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[11] The passages in boldface type quoted in petitioner's brief at pages 28-29 are from the trial judge's opinion in *Florida National*. These passages were dictum, and the Florida Supreme Court did not expressly adopt the trial judge's analysis.

> vested rights: (1) the right of access to the water, *including the right to have the property's contact with the water remain intact*; (2) the right to use the water for navigational purposes; (3) the right to an unobstructed view of the water; and (4) the right to receive accretions and relictions to the property.

512 So. 2d 934, 936 (Fla. 1987) (emphasis added).

We note, preliminarily, that the italicized statement in question was dictum. *Sand Key* presented a question about who owned particular accreted lands; the court was not required to decide whether there was a right to "contact with the water."

Even taken as an authoritative restatement of Florida law, it is doubtful at best whether the *Sand Key* court intended the statement about contact with the water to reflect a right distinct from access. The statement is not separated from access by a new number, as are the other three enumerated riparian rights. It also appears that the source of the statement may have been a 1904 treatise on water rights, where similar language was used to describe the right of access. See 1 H. Farnham, *The Law of Waters and Water Rights* § 62, at 279 (1904) ("The riparian owner is also entitled to have his contact with the water remain intact. This is what is known as the right of access[.]"). As this treatise suggests, "contact with the water" can mean ability to reach the water, as opposed to physically touching it.

In any event, there is no support in Florida law prior to 1987 for petitioner's construction of the italicized statement. There is no mention of a right of physical contact in any Florida decision prior to *Sand Key*. The leading treatise on Florida water law

offers no support for such a right. See F. Maloney et al., *Water Law and Administration: The Florida Experience* §§ 21, 41.1 (1968). Given that the sole support for the "vested right" to maintain physical contact with the water is a statement in a judicial decision in 1987, it is far-fetched to suggest that the Florida Supreme Court impermissibly revised the law by refusing to strike down a statute enacted some seventeen years earlier for failing to recognize this right.

The claimed right of physical contact with water is also inconsistent with key elements of the common law of riparian rights. Avulsive events have been known to occur that result in the deposit of new land on the shore. See *Bryant* v. *Peppe*, 238 So. 2d 836 (Fla. 1970). When this happens, the boundary between the upland owner and the sovereign submerged land does not change. See *id.* at 837. Nevertheless, the avulsion creates a new strip of land between the upland property and the MHWL, which will necessarily eliminate any physical touching of the water by the upland owner. See Maloney, *supra*, § 126.6.

Petitioner argues that littoral land is defined at common law as land that abuts the MHWL, and that this requires at least periodic physical touching of the water. Petitioner claims that if the land no longer touches the water, it will no longer be littoral, and hence all littoral rights will be lost. This claim confuses the source or root of title with the scope and dimension of property rights once title is established. Littoral rights are established by showing that one owns land bounded by the MHWL; once these rights are established, they can endure, even if the condition that gave rise to those rights has changed.

The Florida Act, in the context of a beach reconstruction project, eliminates the defining condition for establishing title to littoral land—abutting the MHWL. But this does not call into question rights previously established which are associated with this land, such as the right of access to water and the right of view. These common law rights, together with vested title to all land upland of the ECL (which tracks the pre-existing MHWL), are expressly preserved by the Act. Fla. Stat. § 161.201.

C. The Establishment Of The ECL

Petitioner's ultimate objective, both in the lower courts and in this Court, is to overturn the use of the fixed boundary line—the ECL—and return to the dynamic boundary defined by the MHWL. Because a beach restoration project will result in a wider beach at a higher elevation than the pre-project beach, the MHWL will shift in a seaward direction after the project is completed. If petitioner can retain the fluctuating MHWL as a property boundary, then petitioner thinks its members can enjoy the benefits of beach restoration and as an added bonus get more private land than they had before. In effect, what petitioner seeks is not less beach protection but *more land*—more land than its members had before the hurricane damage occurred—provided at taxpayers' expense.

Whatever petitioner may hope to achieve through creative constitutional litigation, this is not the result that would obtain at common law. The beach restoration project was not an accretion, since it did not occur "gradually and imperceptibly." See p. 3 & note 2, *supra*. Consequently, the beach restoration would not augment petitioner's members' rights. The restoration project was at once a response to

avulsion—hurricanes Opal and Ivan—and an artificial avulsion undertaken by the State to restore damage caused by these avulsions and prevent future harms. Had the State undertaken the beach restoration project based solely on its common law property rights, these avulsive events would have frozen the boundary between the upland properties and the state land at the *pre-hurricane* MHWL. Petitioner's members would have no claim at common law to new land created by the State seaward of this fixed boundary line. See *Bryant*, 238 So. 2d at 839.

Moreover, petitioner cannot show that there was any understanding, prior to the adoption of the Act, that the use of the MHWL as a boundary was regarded as a *right* of littoral owners. It is true that Florida historically defined the boundaries of littoral land in terms of the fluctuating MHWL, see *Miller* v. *Bay-To-Gulf, Inc.*, 193 So. 425, 427 (Fla. 1940), and continues to do so today with respect to riparian lands not subject to a beach restoration project. But the MHWL was not adopted because littoral owners perceived some value in having an uncertain and variable property boundary. It was adopted out of practical necessity, given the natural fluctuations that continually occur on tidal lands and the lack of public resources available for maintenance of a permanent boundary prior to the adoption of the Act.

There is a broader reason why petitioner's claim is inherently implausible. Petitioner is asserting in effect that variable and uncertain rights cannot be replaced by fixed and certain rights of equivalent value. But fixed and certain rights are generally regarded as a virtue, especially in the law of property. Given the inherent implausibility of its claim, petitioner is forced to proceed by indirection, asserting

the existence of a vested right to future accretion and to physical contact with waters. These rights make sense only if the MHWL remains the boundary. Thus, if petitioner can secure a ruling that accretion and physical contact are vested rights, it hopes this will enshrine the MHWL as a vested right, a proposition for which there is otherwise no support. The Florida Supreme Court saw through this ploy, and its decision should not be disturbed.

D. Other Issues

Petitioner advances a number of additional complaints about the Florida Supreme Court's decision, none of which is substantial.

Petitioner complains that the Florida Supreme Court invoked the common law of avulsion as support for the Florida Act. But petitioner does not suggest that its members suffered any diminution in rights because of the court's discussion of avulsion. The purpose of the court's discussion was to point out that hurricanes are avulsive events, that such events fix the boundary, and that the application of the Act, at least in this case, simply followed the common law in setting the boundary at the pre-avulsion MHWL. Pet. App. 32-33.

Petitioner also suggests that the Florida Supreme Court revised the law by denying that "littoral rights include the right to exclude others from the littoral property." Pet. Br. 21. But the Florida court said nothing about an upland owner's "right to exclude," so there is no possibility of revision on this point. To the extent petitioner is claiming that *the Act* permits the creation of a new dry sand beach between the ECL and the new MHWL, and that *the Act* deprives its members of the "right to exclude" the

public from this strip of sand, then petitioner is raising a federal challenge to the Act that was not pressed or passed on below, and in any event has no basis in law. See pp. 48-49 *infra*.

Finally, petitioner complains repeatedly that the Florida court has allowed "constitutionally protected littoral rights" to be replaced by "inferior and more limited statutory" rights. Pet. Br. 53, 54. This too is a contention that the court failed to invalidate the Act, not a point about judicial revisionism. In any event, petitioner never explains what it means by "constitutionally protected property rights" as opposed to "statutory rights," Pet. Br. 54, or why the latter are "inferior"—and any less constitutionally protected—than the former. This Court has repeatedly recognized that property rights are not created by the Constitution but by nonconstitutional sources of law. See, *e.g.*, *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992) (referring to "our traditional resort to 'existing rules or understandings that stem from an independent source such as state law' to define the range of interests that qualify for protection as 'property' under the Fifth and Fourteenth Amendments," quoting *Roth*, 408 U.S. at 577). There is no indication that the Florida courts share any different understanding.

* * * *

The ultimate question before this Court, it must be stressed, is not whether the Florida Supreme Court correctly described the baseline of Florida property law in determining whether the state legislature had taken riparian rights under Florida constitutional law. As the Court admonished in *Broad River* (and reaffirmed in *Demorest*), "this Court will not inquire whether the rule applied by the state

court is right or wrong, or substitute its own view of what should be deemed the better rule for that of the state court." *Broad River*, 281 U.S. at 541; *Demorest*, 321 U.S. at 42. The only question is whether the Florida court had fair support for its characterization of the property rights petitioner's members enjoyed under Florida law before the Act was implemented in the Destin/Walton Beach project. The answer to that question, it is abundantly clear, is "yes." No judicial taking is presented by this case.

IV. EVEN IF THE FLORIDA SUPREME COURT REVISED STATE LAW WITHOUT FAIR SUPPORT, PETITIONER HAS NO FEDERAL TAKINGS CLAIM.

Petitioner must surmount another hurdle to demonstrate a violation of the U.S. Constitution: it must show that the elimination or modification of rights by the Florida Supreme Court amounted to a taking of property within the meaning of the Constitution.

Not every change in state law—however "sudden" or "unpredictable"—causes a taking cognizable under the Federal Constitution. This is shown by *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74 (1980). There, the California Supreme Court announced a change in California law regarding the rights of shopping center owners to exclude political activists, which was challenged as a judicial taking. See Brief of Appellants at 6, 13, 15-16, *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74 (1980) (No. 79-289). The Court did not reach that question, however, concluding instead that the new interpretation did not sufficiently impair property rights to constitute a taking. See 447 U.S. at 82-84. *PruneYard* instructs that even if a state court decision disturbs

expectations about property rights, it is still necessary to establish that the change constitutes a taking.

The record here contains few facts that ordinarily would be relevant in assessing a federal takings claim. The record is the one generated before the ALJ, which addressed only two nonconstitutional issues. Petitioner's parallel action in the Circuit Court of Leon County (see Appendix B at 20a) could have generated a record on the takings claim. But after the circuit court denied motions for summary judgment, petitioner pressed its takings claim in the court of appeals, based on an administrative record that did not address the takings issue, rather than in the circuit court. As a consequence, this Court is now being asked to adjudicate a novel judicial takings claim on an extremely thin record.

A. Petitioner Has No Cause Of Action Under The Takings Clause

The Takings Clause of the Fifth Amendment, as it applies to the States through the Fourteenth Amendment, contains a "self-executing" cause of action "grounded in the Constitution itself." *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 315 (1987) (citations omitted). Petitioner has no other possible basis for vindicating its judicial taking claim in this Court. The constitutional cause of action requires that the claimant allege that (1) the claimant owns "private property," (2) which has been "taken for public use," (3) without "just compensation." U.S. Const. Amend. V.

Petitioner has not alleged and cannot show that it satisfies two of the three elements set forth in the language of the Clause. STBR has not alleged that it

owns any "private property" and it has not sought an award of "just compensation."

It is elementary, of course, that a claimant must allege a loss of "private property" in order to assert a takings claim. See, *e.g.*, *Phillips* v. *Washington Legal Foundation*, 524 U.S. 156 (1998); *United States* v. *Powelson*, 319 U.S. 266, 281 (1943). This Court has never sustained a takings claim by an entity that owns no property. In *Pennell* v. *City of San Jose*, 485 U.S. 1 (1988), the Court held that an association of landlords had standing to challenge a local rent control ordinance as a taking, regardless of whether an individual landlord who also joined the suit had standing. *Id.* at 7-8 & n.4.[12] The question whether the association could state a cause of action under the Takings Clause was not addressed. The Court denied the takings claim, finding it was "premature" given the state of the record. *Id.* at 9-11. All other takings cases decided by this Court have involved at least one claimant who owned property. See, *e.g.*, *Brown* v. *Legal Foundation of Washington*, 538 U.S. 216, 228 (2003); *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U.S. 302, 312 (2002); *Phillips*, 524 U.S. at 162-63; *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 478 (1987); *Hodel* v. *Virginia Surface Min-*

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[12] Under *Pennell* and *United Food and Commercial Workers Union Local 751* v. *Brown Group, Inc.*, 517 U.S. 544, 554, 556-557 (1996), STBR appears to satisfy this Court's Article III requirements for associational standing. But standing and cause of action are distinct requirements. See *Davis* v. *Passman*, 442 U.S. 228, 239 n.18 (1979). Here, it is settled that the Takings Clause supplies the relevant cause of action, and the question is whether STBR can satisfy its elements.

ing & Reclamation Ass'n Inc., 452 U.S. 264, 273 (1981).

STBR is a non-profit Florida corporation that consists of six members. Pet. 10 n.16. STBR's members own private property. J.A. 211. But STBR has never claimed to own any property itself, see Pet. App. 73, and STBR is the "sole Petitioner" in this case. Pet. Br. ii. Since STBR owns no property, it cannot complain of a taking of property.

The Court has also made plain that the Takings Clause is violated only when the state denies compensation for property it has taken: "The basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First English*, 482 U.S. at 315. Consequently, a takings claim is not ripe for this Court's consideration unless the claimant has sought and been denied compensation by the State. See *Williamson County Regional Planning Comm.* v. *Hamilton Bank*, 473 U.S. 172, 194-197 (1985).

STBR has never sought compensation for any alleged taking of riparian rights in this case. The case began as an action under the Florida APA, in which STBR sought a declaratory judgment that the permit issued by the DEP and the ECL approved by the Board were invalid. STBR never asked for compensation for its members, and could not, because the Florida APA provides only for declaratory and injunctive relief. Fla. Stat. § 120.68(6). If STBR wanted to obtain an award of compensation, it should have filed an action, joined by individual property owners, in the Florida Circuit Court—which it did (Appendix B,

infra), but that case has been held in abeyance, and is not the action that is now before this Court.[13]

In short, petitioner can assert no judicial takings claim, because it owns no property and seeks no compensation, and thus has no cause of action under the Takings Clause.

B. The Appropriate Unit Of Analysis Is The Whole Littoral Parcel As It Existed Before The Project Commenced

If a takings claim is properly presented, then a critical question concerns the relevant unit of property for determining the impact of the action that caused the asserted taking. This is different from determining whether the interest allegedly taken is "property." We acknowledge that the land owned by petitioner's members, and the various incidents of ownership related to the use of the foreshore and the water associated with that land due to its littoral status, are properly characterized as "property" for federal constitutional analysis.[14] Still, it is necessary

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[13] Given that STBR has not and could not seek compensation in this case, it is unnecessary to consider whether the case is ripe under the branch of *Williamson County* that asks whether the State has denied compensation. See 473 U.S. at 194-197. Obviously the State cannot deny compensation when it has not been sought.

[14] Land has always been regarded as a type of property for federal constitutional purposes. See *Lucas*, 505 U.S. at 1016 n.7. Moreover, under Florida law "[r]iparian rights are property rights, incorporeal interests in real estate." *Belvedere Dev. Corp.* v. *Dep't of Transp.*, 476 So. 2d 649, 653 (Fla. 1985). Absent an agreement to the contrary, these rights "are appurtenant to and are inseparable from the riparian land." Fla. Stat. § 253.141(1); *cf. Belvedere*, *supra*. Consequently, they run with the land, without regard to the identity of the owner. They have

to determine the correct unit of property for assessing the impact of the challenged state action. Specifically, is the proper unit of analysis the whole littoral parcel including all appurtenant riparian rights, or should each riparian right be regarded as a distinct and separate item of property? In the familiar metaphor of property as a bundle of rights, is the proper unit the bundle taken as a whole, or each individual stick in the bundle?

Here, both federal constitutional law and Florida law point to the same conclusion: the proper unit is the whole parcel with all appurtenant riparian rights. This Court in a variety of contexts involving real property has held that the appropriate unit of analysis is the "whole parcel." Thus, in *Tahoe-Sierra* the Court held that the relevant unit for purposes of assessing a temporary moratorium on development was the entire life span of the property, not the time period in which the moratorium was in effect. 535 U.S. at 327-329. The Court said the "aggregate must be viewed in its entirety" along both spatial and temporal dimensions. *Id.* at 327 (citation omitted). See also *Keystone Bituminous*, 480 U.S. at 497; *Penn Cent. Transp. Co.* v. *New York City*, 438 U.S. 104, 130-131 (1978).

Florida law is to the same effect. Particularly telling is *Belvedere Development Corp.* v. *Department of Transportation*, 476 So. 2d 649 (Fla. 1985). The certified question was: "Does Florida law permit riparian (or littoral) rights to be separated from riparian land?" *Id.* at 650. The Florida Supreme Court answered that absent a voluntary deed of conveyance of

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been characterized as implied easements, *Brickell* v. *Trammell*, 82 So. 221, 226-227 (Fla. 1919), and easements in land are universally regarded as property rights.

riparian rights from the upland owner, "riparian rights are an inherent aspect of upland ownership, and not severable from it." *Id.* at 651.

Petitioner's argument, contrary to these authorities, assumes that the correct unit of analysis is each separate riparian right. Insofar as petitioner claims a judicial taking, its argument shows at most that the Florida Supreme Court eliminated the right to future accretions and the right to contact with the water. In claiming that the elimination of these rights is a federal taking, petitioner has in effect "conceptually severed" these discrete rights from the whole of the property, treating each right as if it were a freestanding item of property. This Court has repeatedly recognized that this is impermissible. See *Tahoe-Sierra*, 535 U.S. at 331 (noting that "defining the property interest taken in terms of the very regulation being challenged is circular"); *Concrete Pipe & Prods. of Cal., Inc.* v. *Constr. Laborers Pension Trust*, 508 U.S. 602, 644 (1993) (warning that "a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable").

A second and equally important question concerns the point in time at which the value of the relevant unit is ascertained. Takings analysis requires a before-and-after measurement of property. The appropriate time at which to ascertain the scope of a claimant's "before" interest is immediately prior to the state action that is alleged to cause the taking. See, *e.g.*, *United States* v. *Va. Elec. & Power Co.*, 365 U.S. 624, 632 (1961). The claimant is not allowed to recover any increase in value due to the "projected improvement" brought about by the government pro-

ject itself. *United States* v. *Miller*, 317 U.S. 369, 377 (1943).

Here, the scope of petitioner's members' rights should be determined as they stood *before* the beach restoration project commenced. Their rights at that time would not include any enhanced ownership of land attributable to the beach restoration itself, or any other rights the statute confers once reconstruction is undertaken.

In particular, petitioner's claim of an entitlement to a strip of the reconstructed beach between the ECL and the new MHWL cannot be regarded as part of their baseline of property rights, because this strip of beach was *only created because of the state restoration project that is the very undertaking petitioner challenges as a taking*. Petitioner claims that the Act deprives its members of "the right to exclude persons from the dry [s]and beach in front of their homes to the post-nourishment MHWL," Pet. Br. 54-55, and that they have lost any right to "make a profit" from, "dispose of or sell" this new strip of sand. *Id.* at 58. Petitioner is here complaining of the loss of property that *did not exist* when the restoration project started. The property petitioner says has been taken was created by the government on land owned by the government with funding provided by the government. The correct baseline for measuring the impact of the Florida court decision is what petitioner's members lost because of the challenged action, not what they would like to gain.

In sum, the appropriate baseline of rights with which to analyze petitioner's takings claim is the entire bundle of property rights petitioner's members enjoyed immediately before the beach reconstruction project was undertaken.

C. No Physical Invasion Of Petitioner's Members' Lands Is Presented

Petitioner's principal argument for why the Florida Supreme Court's decision violated the Takings Clause is that it sanctioned a "physical invasion" of petitioner's members' property. Pet. Br. 51-53. The attempt is to shoehorn this case into the line of decisions, exemplified by *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), holding that permanent physical occupations of land by the government are categorically regarded as takings without regard to the impact on the owner's bundle of property rights. This Court has rejected attempts to apply *Loretto* to state interventions that affect the value of property, but fall short of an actual physical invasion. See, *e.g.*, *Yee* v. *City of Escondido*, 503 U.S. 519, 527 (1992).

There can be no claim that either the Florida Act or the Destin/Walton County Beach project caused a physical invasion of the column of space that defines petitioner's members' ownership of land. Petitioner contends that the substitution of a fixed ECL for a dynamic MHWL "effects a physical taking of STBR's members' property." Pet. Br. 52. But petitioner abandoned any claim in the administrative proceedings that the location of the ECL deviated in any respect from the previous MHWL. On this record, it must be accepted that although the boundaries of petitioner's members' properties are now fixed rather than fluctuating, they are physically located exactly where they were before the ECL was established. Petitioner's members' land has not been physically diminished in any way by the restoration project.

Petitioner's brief asserts that respondents trespassed on their land in rebuilding the beach. Pet. Br.

12 n.9. No allegation was made below that respondents either entered petitioner's members' land without their consent, or sanctioned such actions by others, and the record supports no such claim.[15] Petitioner also asserts that the beach restoration will result in multiple vendors hawking merchandise and services on the new beach created by the project. Pet. Br. 55. Again, no evidence was presented below about the nature or extent of public activity permitted on the new beach, which in any event is located on state sovereign land. See Fla. Stat. § 161.191. Consequently, there is no physical occupation of members' land within the meaning of *Loretto*.

D. The Eminent Domain Framework

Perhaps the most straightforward way to assess the takings claim in this case is to consider the matter from the perspective of eminent domain law. After all, this is a challenge to a government construction project, which frequently requires use of eminent domain, and not to land use regulations.

The matter is analogous to one in which the government decides to rebuild a public street. See *United States* v. *Willow River Power Co.*, 324 U.S. 499, 510-511 (1945) (relying on this analogy in resolving a takings claim involving riparian rights).

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[15] In an affidavit filed in the Florida District Court of Appeals, petitioner alleged that "renourishment" activity occurred on the land of two of its members. J.A. 278. The affidavit does not indicate, however, that either of these members joined a letter signed by the four other members informing Walton County and its contractor that they did not have permission to enter their property. *Id.* at 276-277. The record is thus consistent with the possibility that these members either did not object or granted oral permission to the contractor to enter.

Suppose the government decides to raise and widen a street, staying within the bounds of a right of way as to which it already holds the necessary rights. Abutting landowners complain that the project will diminish the value of their property, for example by impairing access, or by increasing noise and traffic, or by diminishing the quality of their view. The eminent domain issue is whether these indirect or consequential harms to abutting owners give rise to a federal constitutional right to compensation.

The general principles governing this question have been well established. If there is no physical appropriation of the abutting landowners' property, "the Constitution has never been construed as requiring payment of consequential damages." *Miller*, 317 U.S. at 376; see also, *e.g.*, *Willow River*, *supra*. Thus, as long as the construction project stays within the bounds of the existing right of way, there is no constitutional obligation to compensate adjacent landowners for injuries due to changes in the grade of the street, *Ettor* v. *City of Tacoma*, 228 U.S. 148 (1913); temporary lack of access during public construction activities, *N. Transp. Co.* v. *Chicago*, 99 U.S. 635 (1878); ordinary nuisances attributed to increased traffic, *Richards* v. *Washington Terminal Co.*, 233 U.S. 546 (1914); loss of view, *Reichelderfer* v. *Quinn*, 287 U.S. 315 (1932); or loss or even destruction of businesses, *Mitchell* v. *United States*, 267 U.S. 341 (1925). These sorts of consequential damages are regarded, as a matter of constitutional law, as *damnum absque injuria*.

There is a further, and equally dispositive, reason why there is no taking under the eminent domain framework. This Court has held that the government is permitted to consider offsetting benefits

to owners in cases involving partial takings of land. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 150 (1974); *Bauman* v. *Ross*, 167 U.S. 548 (1897). If the government can consider offsetting benefits in partial takings, then it may consider offsetting benefits in cases with no physical invasion at all. The Florida Act *expressly directs* that offsetting benefits be considered in any action seeking just compensation for a taking of property pursuant to beach restoration. Fla. Stat. § 161.212(3)(b).

Petitioner's members received extensive benefits from the beach restoration project, including: the suspension of common law liability to erosion; enhanced protection against erosion and avulsion provided at public expense by the project itself; enhanced protection of structures from future storm surges provided at public expense; express preservation of common law rights of access, view, and use of the waters; the government's guarantee that no structures will be allowed between private property and the waters; and the government's guarantee that beach activities injurious to upland owner's interests will not be allowed. See Fla. Stat. § 161.201.

The elimination of future erosion more than offsets the loss of opportunities for future accretion. Petitioner suggests that its members live on an "accreting beach," Pet. Br. 6, intimating that they are net losers from a suspension of accretion and erosion. The record contains no support for this claim. The uncontradicted testimony of the DEP's expert was that the beach is "significantly eroding." J.A. 163.[16]

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[16] Petitioner cites in support of its claim of an "accreting beach" a passage from the Environment Assessment. This says that "[n]et longshore transport rates" reveal "an accretive trend"

As to having one's land physically touch the water, this is of little value aside from its legal significance at common law—for which the Act provides a more secure equivalent. The project will at least temporarily add distance between petitioner's members' property and the water line. But whether this is detrimental is doubtful. Petitioner's members may have to walk a few additional steps to reach the water, but they will also have more beach to use for recreational activities, and members of the public—who were using the beach prior to the restoration—are likely to remove themselves farther from petitioner's members property.

In sum, the detriments, if any, associated with suspension of the common law of accretion and the loss of physical contact with the water cannot outweigh the benefits provided by the Act and the project. As this Court has observed in a related context, "if governmental activities inflict slight damage upon land in one respect and actually confer great benefits when measured in the whole, to compensate the landowner further would be to grant him a special bounty." *United States* v. *Sponenbarger*, 308 U.S. 256, 266-267 (1939). For the same reason, the Florida Supreme Court, even assuming its decision had no fair support, did not commit a judicial taking.[17]

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that would allow the beach to recover on its own "absent storms," but that "insufficient recovery times between storms have caused the present unhealthy beach conditions." J.A. 252. In other words, because of frequent storms the beach is eroding.

[17] Petitioner implicitly acknowledges that under the ad hoc takings framework associated with *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104, 124 (1978), there is no taking. The record contains no evidence directly bearing on two critical *Penn Central* factors: diminution in value and the impact on petitioner's investment-backed expectations. Any defi-

CONCLUSION

The decision of the Florida Supreme Court should be affirmed.

Respectfully submitted.

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ciencies in the record on this score must be attributed to petitioner's litigation choices, and petitioner must bear the consequences of failing to advance or prove a *Penn Central* claim.

APPENDICES

APPENDIX A

Florida Statutes (2009)

Excerpts of Title XI Chapter 161, Part I:

Regulation of Construction, Reconstruction, and Other Physical Activity

161.011 Short title.—Parts I and II of this chapter may be known and cited as the "Beach and Shore Preservation Act."

161.021 Definitions.—In construing these statutes, where the context does not clearly indicate otherwise, the word, phrase, or term:

(1) "Access" or "public access" as used in ss. 161.041, 161.052, and 161.053 means the public's right to laterally traverse the sandy beaches of this state where such access exists on or after July 1, 1987, or where the public has established an accessway through private lands to lands seaward of the mean high tide or water line by prescription, prescriptive easement, or any other legal means, development or construction shall not interfere with such right of public access unless a comparable alternative accessway is provided.

(2) "Beach and shore preservation," "erosion control, beach preservation and hurricane protection," "beach erosion control" and "erosion control" includes, but is not limited to, erosion control, hurricane protection, coastal flood control, shoreline and offshore rehabilitation, and regulation of work and activities likely to affect the physical condition of the beach or shore.

(3) "Beach nourishment" means the maintenance of a restored beach by the replacement of sand.

(4) "Beach restoration" means the placement of sand on an eroded beach for the purposes of restoring it as a recreational beach and providing storm protection for upland properties.

(5) "Board of trustees" means the Board of Trustees of the Internal Improvement Trust Fund.

(6) "Coastal construction" includes any work or activity which is likely to have a material physical effect on existing coastal conditions or natural shore and inlet processes.

(7) "Department" means the Department of Environmental Protection.

(8) "Emergency" means any unusual incident resulting from natural or unnatural causes which endangers the health, safety, or resources of the residents of the state, including damages or erosion to any shoreline resulting from a hurricane, storm, or other such violent disturbance.

(9) "Inlet sediment bypassing" includes any transfer of sediment from an inlet or beach to another stretch of beach for the purpose of nourishment and beach erosion control.

(10) "Local government" means a county, municipality, community development district, or independent special taxing district.

* * * * *

161.088 Declaration of public policy respecting beach erosion control and beach restoration and nourishment projects.—Because beach erosion is a serious menace to the economy

and general welfare of the people of this state and has advanced to emergency proportions, it is hereby declared to be a necessary governmental responsibility to properly manage and protect Florida beaches fronting on the Atlantic Ocean, Gulf of Mexico, and Straits of Florida from erosion and that the Legislature make provision for beach restoration and nourishment projects, including inlet management projects that cost-effectively provide beach-quality material for adjacent critically eroded beaches. The Legislature declares that such beach restoration and nourishment projects, as approved pursuant to s. 161.161, are in the public interest; must be in an area designated as critically eroded shoreline, or benefit an adjacent critically eroded shoreline; must have a clearly identifiable beach management benefit consistent with the state's beach management plan; and must be designed to reduce potential upland damage or mitigate adverse impacts caused by improved, modified, or altered inlets, coastal armoring, or existing upland development. Given the extent of the problem of critically eroded beaches, it is also declared that beach restoration and nourishment projects shall be funded in a manner that encourages all cost-saving strategies, fosters regional coordination of projects, improves the performance of projects, and provides long-term solutions. The Legislature further declares that nothing herein is intended to reduce or amend the beach protection programs otherwise established in this chapter or to result in local governments altering the coastal management elements of their local government comprehensive plans pursuant to chapter 163.

161.141 Property rights of state and private upland owners in beach restoration project areas.—The Legislature declares that it is the public

policy of the state to cause to be fixed and determined, pursuant to beach restoration, beach nourishment, and erosion control projects, the boundary line between sovereignty lands of the state bordering on the Atlantic Ocean, the Gulf of Mexico, or the Straits of Florida, and the bays, lagoons, and other tidal reaches thereof, and the upland properties adjacent thereto; except that such boundary line shall not be fixed for beach restoration projects that result from inlet or navigation channel maintenance dredging projects unless such projects involve the construction of authorized beach restoration projects. However, prior to construction of such a beach restoration project, the board of trustees must establish the line of mean high water for the area to be restored; and any additions to the upland property landward of the established line of mean high water which result from the restoration project remain the property of the upland owner subject to all governmental regulations and are not to be used to justify increased density or the relocation of the coastal construction control line as may be in effect for such upland property. The resulting additions to upland property are also subject to a public easement for traditional uses of the sandy beach consistent with uses that would have been allowed prior to the need for the restoration project. It is further declared that there is no intention on the part of the state to extend its claims to lands not already held by it or to deprive any upland or submerged land owner of the legitimate and constitutional use and enjoyment of his or her property. If an authorized beach restoration, beach nourishment, and erosion control project cannot reasonably be accomplished without the taking of private property, the taking must be made by the requesting authority by eminent domain proceed-

ings. In any action alleging a taking of all or part of a property or property right as a result of a beach restoration project, in determining whether such taking has occurred or the value of any damage alleged with respect to the owner's remaining upland property adjoining the beach restoration project, the enhancement, if any, in value of the owner's remaining adjoining property of the upland property owner by reason of the beach restoration project shall be considered. If a taking is judicially determined to have occurred as a result of a beach restoration project, the enhancement in value to the owner's remaining adjoining property by reason of the beach restoration project shall be offset against the value of the damage, if any, resulting to such remaining adjoining property of the upland property owner by reason of the beach restoration project, but such enhancement in the value shall not be offset against the value of the property or property right alleged to have been taken. If the enhancement in value shall exceed the value of the damage, if any, to the remaining adjoining property, there shall be no recovery over against the property owner for such excess.

* * * * *

161.151 Definitions; ss. 161.141-161.211.—As used in ss. 161.141-161.211:

(1) "Board of trustees" means the Board of Trustees of the Internal Improvement Trust Fund.

(2) "Requesting authority" means any coastal county, municipality, or beach erosion control district which requests a survey by the board of trustees under the provisions of ss. 161.141-161.211.

(3) "Erosion control line" means the line determined in accordance with the provisions of ss.

161.141-161.211 which represents the landward extent of the claims of the state in its capacity as sovereign titleholder of the submerged bottoms and shores of the Atlantic Ocean, the Gulf of Mexico, and the bays, lagoons and other tidal reaches thereof on the date of the recording of the survey as authorized in s. 161.181.

(4) "Authorized beach restoration project" means a beach project authorized by the United States Congress or the department which involves a specific project engineering design and a project maintenance program for a period of not less than 10 years.

161.161 Procedure for approval of projects.—

(1) The department shall develop and maintain a comprehensive long-term management plan for the restoration and maintenance of the state's critically eroded beaches fronting the Atlantic Ocean, Gulf of Mexico, and Straits of Florida. The beach management plan shall:

(a) Address long-term solutions to the problem of critically eroded beaches in this state.

(b) Evaluate each improved, modified, or altered inlet and determine whether the inlet is a significant cause of beach erosion. With respect to each inlet determined to be a significant cause of beach erosion, the plan shall include:

1. The extent to which such inlet causes beach erosion and recommendations to mitigate the erosive impact of the inlet, including, but not limited to, recommendations regarding inlet sediment bypassing; modifications to channel dredging, jetty design, and disposal of spoil material; estab-

lishment of feeder beaches; and beach restoration and beach nourishment; and

2. Cost estimates necessary to take inlet corrective measures and recommendations regarding cost sharing among the beneficiaries of such inlet.

(c) Design criteria for beach restoration and beach nourishment projects, including, but not limited to:

1. Dune elevation and width and revegetation and stabilization requirements; and

2. Beach profile.

(d) Evaluate the establishment of feeder beaches as an alternative to direct beach restoration and recommend the location of such feeder beaches and the source of beach-compatible sand.

(e) Identify causes of shoreline erosion and change, calculate erosion rates, and project long-term erosion for all major beach and dune systems by surveys and profiles.

(f) Identify shoreline development and degree of density and assess impacts of development and shoreline protective structures on shoreline change and erosion.

(g) Identify short-term and long-term economic costs and benefits of beaches, including recreational value to user groups, tax base, revenues generated, and beach acquisition and maintenance costs.

(h) Study dune and vegetation conditions.

(i) Identify beach areas used by marine turtles and develop strategies for protection of the turtles and their nests and nesting locations.

(j) Identify alternative management responses to preserve undeveloped beach and dune systems, to restore damaged beach and dune systems, and to prevent inappropriate development and redevelopment on migrating beaches, and consider beach restoration and nourishment, armoring, relocation and abandonment, dune and vegetation restoration, and acquisition.

(k) Establish criteria, including costs and specific implementation actions, for alternative management techniques.

(l) Select and recommend appropriate management measures for all of the state's sandy beaches in a beach management program.

(m) Establish a list of beach restoration and beach nourishment projects, arranged in order of priority, and the funding levels needed for such projects.

The beach management plan may be prepared at the regional level based upon areas of greatest need and probable federal funding. Such regional plans shall be components of the statewide beach management plan and shall serve as the basis for state funding decisions upon approval in accordance with chapter 86-138, Laws of Florida. In accordance with a schedule established for the submission of regional plans by the department, any completed plan must be submitted to the secretary of the department for approval no later than March 1 of each year. These regional plans shall include, but shall not be limited to, recommendations of appropriate funding mechanisms for implementing projects in the beach management plan, giving consideration to the use of single-county and multicounty taxing districts or other

revenue generation measures by state and local governments and the private sector. Prior to presenting the plan to the secretary of the department, the department shall hold a public meeting in the areas for which the plan is prepared. The plan submission schedule shall be submitted to the secretary for approval. Any revisions to such schedule must be approved in like manner.

(2) Upon approval of the beach management plan, the secretary shall present to the President of the Senate, the Speaker of the House of Representatives, and the chairs of the legislative appropriations committees recommendations for funding of beach erosion control projects. Such recommendations shall be presented to such members of the Legislature in the priority order specified in the plan and established pursuant to criteria contained in s. 161.101(14).

(3) Once a project is determined to be undertaken, a survey of all or part of the shoreline within the jurisdiction of the local government in which the beach is located shall be conducted in order to establish the area of beach to be protected by the project and locate an erosion control line. No provision of ss. 161.141-161.211 shall be construed as preventing a local government from participating in the funding of erosion control projects or surveys undertaken in accordance with the provisions of ss. 161.141-161.211. In lieu of conducting a survey, the board of trustees may accept and approve a survey as initiated, conducted, and submitted by the appropriate local government if said survey is made in conformity with the appropriate principles set forth in ss. 161.141-161.211.

(4) Upon completion of the survey depicting the area of the beach erosion control project and the proposed location of the erosion control line, the board of trustees shall give notice of the survey and the date on which the board of trustees will hold a public hearing for the purpose of receiving evidence on the merits of the proposed erosion control line and, if approval is granted, of locating and establishing such requested erosion control line. Such notice shall be by publication in a newspaper of general circulation published in the county or counties in which the proposed beach erosion control project shall be located not less than once a week for 3 consecutive weeks and by mailing copies of such notice by certified or registered mail to each riparian owner of record of upland property lying within 1,000 feet (radial distance) of the shoreline to be extended through construction of the proposed beach erosion control project, as his or her name and address appear upon the latest tax assessment roll, in order that any persons who have an interest in the location of such requested erosion control line can be present at such hearing to submit their views concerning the precise location of the proposed erosion control line. Such notice shall be in addition to any notice requirement in chapter 120.

(5) The board of trustees shall approve or disapprove the erosion control line for a beach restoration project. In locating said line, the board of trustees shall be guided by the existing line of mean high water, bearing in mind the requirements of proper engineering in the beach restoration project, the extent to which erosion or avulsion has occurred, and the need to protect existing ownership of as much upland as is reasonably possible.

(6) In no event shall the department undertake a beach restoration or beach nourishment project where a local share is required without the approval of the local government or governments responsible for that local share.

(7) The department may adopt rules to administer this section.

* * * * *

161.181 Recording of resolution and survey of board of trustees.—If no review is taken within the time prescribed from the decision of the board of trustees or, if review be timely taken, in the absence of a final decision of a court of competent jurisdiction preventing the implementation of a beach erosion control project or invalidating, abolishing, or otherwise preventing the establishment and recordation of the erosion control line as provided herein, the board of trustees shall file in the public records of the county or counties in which the erosion control line lies, a copy of its resolution approving the beach erosion control project and locating the erosion control line and shall also file and cause to be recorded in the book of plats of said county or counties a survey showing the area of beach to be protected and the location of the erosion control line.

161.191 Vesting of title to lands.—

(1) Upon the filing of a copy of the board of trustees' resolution and the recording of the survey showing the location of the erosion control line and the area of beach to be protected as provided in s. 161.181, title to all lands seaward of the erosion control line shall be deemed to be vested in the state by right of its sovereignty, and title to all lands landward of such line shall be vested in the riparian up-

land owners whose lands either abut the erosion control line or would have abutted the line if it had been located directly on the line of mean high water on the date the board of trustees' survey was recorded.

(2) Once the erosion control line along any segment of the shoreline has been established in accordance with the provisions of ss. 161.141-161.211, the common law shall no longer operate to increase or decrease the proportions of any upland property lying landward of such line, either by accretion or erosion or by any other natural or artificial process, except as provided in s. 161.211(2) and (3). However, the state shall not extend, or permit to be extended through artificial means, that portion of the protected beach lying seaward of the erosion control line beyond the limits set forth in the survey recorded by the board of trustees unless the state first obtains the written consent of all riparian upland owners whose view or access to the water's edge would be altered or impaired.

161.201 Preservation of common-law rights.—Any upland owner or lessee who by operation of ss. 161.141-161.211 ceases to be a holder of title to the mean high-water line shall, nonetheless, continue to be entitled to all common-law riparian rights except as otherwise provided in s. 161.191(2), including but not limited to rights of ingress, egress, view, boating, bathing, and fishing. In addition the state shall not allow any structure to be erected upon lands created, either naturally or artificially, seaward of any erosion control line fixed in accordance with the provisions of ss. 161.141-161.211, except such structures required for the prevention of erosion. Neither shall such use be permitted by the state as may be injurious to the person, business, or

property of the upland owner or lessee; and the several municipalities, counties and special districts are authorized and directed to enforce this provision through the exercise of their respective police powers.

161.211 Cancellation of resolution for nonperformance by board of trustees.—

(1) If for any reason construction of the beach erosion control project authorized by the board of trustees is not commenced within 2 years from the date of the recording of the board of trustees' survey, as provided in s. 161.181, or in the event construction is commenced but halted for a period exceeding 6 months from commencement, then, upon receipt of a written petition signed by those owners or lessees of a majority of the lineal feet of riparian property which either abuts or would have abutted the erosion control line if the same had been located at the line of mean high water on the date the board of trustees' survey was recorded, the board of trustees shall forthwith cause to be canceled and vacated of record the resolution authorizing the beach erosion control project and the survey locating the erosion control line, and the erosion control line shall be null and void and of no further force or effect.

(2) If the state, county, municipality, erosion control district, or other governmental agency charged with the responsibility of maintaining the protected beach fails to maintain the same and as a result thereof the shoreline gradually recedes to a point or points landward of the erosion control line as established herein, the provisions of s. 161.191(2) shall cease to be operative as to the affected upland.

(3) In the event a substantial portion of the shoreline encompassed within the erosion control project recedes landward of the erosion control line, the board of trustees, on its own initiative, may direct or request, or, upon receipt of a written petition signed by the owners or lessees of a majority of the lineal feet of riparian property lying within the erosion control project, shall direct or request, the agency charged with the responsibility of maintaining the beach to restore the same to the extent provided for in the board of trustees' recorded survey. If the beach is not restored as directed or requested by the board of trustees within a period of 1 year from the date of the directive or request, the board of trustees shall forthwith cause to be canceled and vacated of record the resolution authorizing the beach erosion control project and the survey locating the erosion control line, and the erosion control line shall be null and void and of no further force or effect.

161.212 Judicial review relating to permits and licenses.—

(1) As used in this section, unless the context otherwise requires:

(a) "Agency" means any official, officer, commission, authority, council, committee, department, division, bureau, board, section, or other unit or entity of state government.

(b) "Permit" means any permit or license required by this chapter.

(2) Any person substantially affected by a final action of any agency with respect to a permit may seek review within 90 days of the rendering of such decision and request monetary damages and other relief in the circuit court in the judicial circuit in

which the affected property is located; however, circuit court review shall be confined solely to determining whether final agency action is an unreasonable exercise of the state's police power constituting a taking without just compensation. Review of final agency action for the purpose of determining whether the action is in accordance with existing statutes or rules and based on competent substantial evidence shall proceed in accordance with chapter 120.

(3) If the court determines the decision reviewed is an unreasonable exercise of the state's police power constituting a taking without just compensation, the court shall remand the matter to the agency which shall, within a reasonable time:

(a) Agree to issue the permit;

(b) Agree to pay appropriate monetary damages; however, in determining the amount of compensation to be paid, consideration shall be given by the court to any enhancement to the value of the land attributable to governmental action; or

(c) Agree to modify its decision to avoid an unreasonable exercise of police power.

(4) The agency shall submit a statement of its agreed-upon action to the court in the form of a proposed order. If the action is a reasonable exercise of police power, the court shall enter its final order approving the proposed order. If the agency fails to submit a proposed order within a reasonable time not to exceed 90 days which specifies an action that is a reasonable exercise of police power, the court may order the agency to perform any of the alternatives specified in subsection (3).

(5) The court shall award reasonable attorney's fees and court costs to the agency or substantially affected person, whichever prevails.

(6) The provisions of this section are cumulative and shall not be deemed to abrogate any other remedies provided by law.

APPENDIX B*

**IN THE CIRCUIT COURT OF
THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA**

SAVE OUR BEACHES, INC., a Florida Not-for-Profit Corporation, STOP THE BEACH RENOURISHMENT, INC., a Florida Not-for-Profit Corporation FLAMINGO INVESTMENT PROPERTIES, LLC, a Florida Limited Liability Company, PATRICK ROSS, DENNIS T. JONES, TAMMY N. ALFORD, SLADE LINDSAY, Plaintiffs, vs. BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND; FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION; THE CITY OF DESTIN, a Municipal Corporation; and WALTON COUNTY, a political subdivision of the State of Florida, Defendants.	**CASE NO. 04-CA-2093**

* This Amended Complaint has been reproduced as filed, including any typographical errors.

AMENDED COMPLAINT

Plaintiffs, SAVE OUR BEACHES, INC., and STOP THE BEACH RENOURISHMENT, INC., Florida Nor-for-Profit Corporations, FLAMINGO INVESTMENT PROPERTIES, LLC, a Florida Limited Liability Company, PATRICK ROSS, DENNIS T. JONES, TAMMY N. ALFORD, and SLADE LINDSAY, (collectively "Plaintiffs") by and through their undersigned counsel, hereby sue the Defendants, BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND ("TRUSTEES"), FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION ("DEP"), THE CITY OF DESTIN, FLORIDA ("DESTIN"), a Municipal Corporation, WALTON COUNTY, FLORIDA ("WALTON"), a political subdivision of the State of Florida (collectively "Defendants") and allege as follows:

JURISDICTION AND VENUE

l. This is an action for declaratory and injunctive relief involving rights and liabilities in excess of fifteen thousand dollars ($15,000.00), exclusive of interest and attorneys fees, and brought pursuant to Florida common law, the Florida Declaratory Judgment Act, Chapter 86, Fla. Stat., the Florida Constitution, and the Fifth and Fourteenth Amendments of the United States Constitution.

2. Venue in this Court is proper in that Defendants, TRUSTEES, and DEP reside in Leon County.

PARTIES

3. Plaintiff, Flamingo Investment Properties, LLC, ("Flamingo") is a Florida Limited Liability Company organized and existing under the laws of the State of Florida, situated in Okaloosa County, Florida. Flamingo owns several parcels of real prop-

erty (County parcel numbers 00-2S-22-0580-000A-007P; 00-2S-22-0595-0000-0080; 00-2S-22-0584-0000-0100) in Okaloosa County fronting the Gulf of Mexico such that the boundary of their property is the mean high water line of the Gulf of Mexico.

4. Plaintiff, Patrick Ross, is an individual owning a two parcels of property (County parcel number 00-2S-22-1076-0000-0090) in Okaloosa County fronting the Gulf of Mexico such that the boundary of his property is the mean high water line of the Gulf of Mexico.

5. Plaintiff, Dennis T. Jones, is an individual owning a parcel of property (County parcel number 00-2S-22-0080-0000-0070) in Okaloosa County fronting the Gulf of Mexico such that the boundary of his property is the mean high water line of the Gulf of Mexico.

6. Plaintiff, Tammy N. Alford, is an individual owning a parcel of property (County parcel number 34-2S-21-42000-019-0010) in Walton County fronting the Gulf of Mexico such that the boundary of her property is the mean high water line of the Gulf of Mexico.

7. Plaintiff, Slade Lindsay, is an individual owning a parcel of property (County parcel number 34-25-21-42000-019-0011) in Walton County fronting the Gulf of Mexico such that the boundary of his property is the mean high water line of the Gulf of Mexico.

8. Plaintiff, Save Our Beaches, Inc., ("SOB") is comprised of individuals owning real property along the Gulf of Mexico within the City limits of the City of Destin, Okaloosa County, Florida. *See* Exhibit "A" which includes members of SOB.

9. A substantial number of SOB's members (including individual Plaintiffs Flamingo, Ross, and Jones) own property in the City of Destin fronting the Gulf of Mexico such that the boundary of their property is the mean high water line of the Gulf of Mexico.

10. Plaintiff, Stop the Beach Renourishment, Inc., ("STBR") is comprised of persons owning real property along the Gulf of Mexico within the County limits of Walton County, Florida. *See* Exhibit "B" which includes members of STBR.

11. A substantial number of STBR's members (including individual Plaintiffs Alford and Lindsay) own property fronting the Gulf of Mexico such that the boundary of their property is the mean high water line of the Gulf of Mexico.

12. As a result of Flamingo, Ross, Jones, Alford, and Lindsay ("Individual Plaintiffs") owning Gulf-front upland properties to the mean high water line of the Gulf of Mexico, their properties enjoy, contain, and possess littoral (a/k/a riparian) property rights.

13. Likewise, STBR's and SOB's members who own upland properties to the mean high water line of the Gulf of Mexico, enjoy, contain, and possess littoral (a/k/a riparian) property rights.

14. SOB and STBR members who own littoral property have been substantially and adversely affected by the Defendants' Beach Renourishment Project and their actions in furtherance thereof.

15. SOB and STBR members who own littoral property in Walton County and the City of Destin have and will suffer harm specific to themselves and not shared with the public generally.

16. Defendant, TRUSTEES, is an agency of the State of Florida comprised of the Governor, Attorney General, Chief Financial Officer, and Commissioner of Agriculture, headquartered in Tallahassee, Leon County, Florida. The TRUSTEES are charged with the responsibility of managing all state owned lands with the authority to sue and be sued. § 253.02, Fla. Stat.

17. Defendant, DEP, is an agency of the State of Florida headquartered in Tallahassee, Leon County, Florida with the responsibility of carrying out the "Beach and Shore Preservation Act" (§§ 161.011–161.45, Fla. Stat.) ("Act").

18. Defendant, WALTON, is a political subdivision of the State of Florida.

19. Defendant, DESTIN is a Florida Municipal Corporation.

GENERAL ALLEGATIONS

20. At issue in this action is whether Sections 161.141, 161.161 and l61.191, Fla. Stat. (2003) and the Act, are constitutional as they facilitate the physical confiscation of private property without providing landowners due process of law or just and full compensation, through eminent domain proceedings.

21. Alternatively, if the Court finds the sections and Act constitutional, Plaintiffs seek a declaration that constitutionally protected private property rights will be taken by the proposed beach renourishment project which must be acquired by eminent domain proceedings prior to the commencement of any beach renourishment project.

22. DESTIN and WALTON have applied for permits and grants to conduct Beach Restoration along a 6.9 mile stretch of beach (encompassing the properties of the Individual Plaintiffs and SOB/STBR members who own littoral property) pursuant to the "Beach and Shore Preservation Act."

23. Plaintiffs challenge this Act because it physically confiscates constitutionally protected littoral property rights without providing due process of law or just and full compensation.

24. Pursuant to the Act, Defendant DEP issued a "Consolidated Notice of Intent to Issue Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands" to DESTIN and WALTON on July 15, 2004.

25. Pursuant to the Act, once a beach erosion control project is to be undertaken, the TRUSTEES are required to establish an "Erosion Control Line" (ECL).

26. The ECL will "represent the landward extent of the claims of the state in its capacity as sovereign titleholder of the submerged bottoms and shores of the . . . Gulf of Mexico . . . ." § 161.151(2), Fla. Stat.

27. Once the TRUSTEES establish the ECL, the Act purports to vest title to all lands seaward of the ECL with the State regardless of the constitutional property rights to newly created lands by accretion or alluvion possessed by the Individual Plaintiffs and SOB/STBR members who own littoral property. Section 161.191, Fla. Stat., provides, in relevant part:

> (1) Upon the filing of a copy of the board of trustees' resolution and the recording of the survey showing the location of the erosion control line and the area of beach to be pro-

> tected as provided in s. 161.181 title to all lands seaward of the erosion control line shall be deemed to be vested in the state by right of its sovereignty, and title to all lands landward of such line shall be vested in the riparian upland owners whose lands either abut the erosion control line or would have abutted the line if it had been located directly on the line of mean high water on the date the board of trustees' survey was recorded.
>
> (2) Once the erosion control line along any segment of the shoreline has been established in accordance with the provisions of ss. 161.141–161.211, *the common law shall no longer operate to increase or decrease the proportions of any upland property lying landward of such line, either by accretion or erosion or by any other natural or artificial process*, ...

§ 161.191, Fla. Stat. (emphasis added).

28. The Act further states that the addition of sand to the privately owned upland property will automatically become subject to a public easement, without first providing landowners procedural due process of law or just and full compensation.

29. Specifically, Section 161.141, Fla. Stat., provides in part:

> any additions to the upland property landward of the established line of mean high water which result from the restoration project remain the property of the upland owner subject to all governmental regulations and are not to be used to justify increased density or the relocation of the coastal construction con-

> trol line as may be in effect for such upland property. *The resulting additions to upland property are also subject to a public easement for traditional uses of the sandy beach consistent with uses that would have been allowed prior to the need for the restoration project*. . . If an authorized beach restoration, beach nourishment, and erosion control project cannot reasonably be accomplished without the taking of private property, the taking must be made by the requesting authority by eminent domain proceedings.

§ 161.141, Fla. Stat. (emphasis added).

30. The Individual Plaintiffs and SOB/STBR members who own littoral property, as littoral property owners, possess littoral property rights which include *at least* the following vested rights: the right to receive accretions and relictions of property; the right to have their property's contact with the water remain intact; the right to an unobstructed view of the water; and an exclusive right to access the water from their property.

31. Section 161.191, Fla. Stat. – on its face and as-applied by the Defendants – by changing the common law and these vested constitutional property rights unconstitutionally deprives the Individual Plaintiffs and SOB/STBR members who own littoral property of their constitutionally protected littoral property rights without due process of law and just and full compensation under the United States and Florida Constitutions.

32. TRUSTEES' actions in adopting and recording an ECL without first instituting eminent domain proceedings under the Act is an unconstitutional

deprivation of the constitutionally protected littoral property rights of the Individual Plaintiffs and SOB/STBR members who own littoral property without due process and just and full compensation under the United States and Florida Constitutions.

33. The TRUSTEES' have adopted a Resolution dated June 25, 2004 as required by Section 161.161, Fla. Stat., which establishes the "Western Walton County Erosion Control Line."

34. The TRUSTEES' have adopted a Resolution dated December 30, 2004 as required by Section 161.161, Fla. Stat., which establishes the "City of Destin Erosion Control Line."

35. The constitutional property rights of SOB's members who own littoral property, along with Flamingo, Ross, and Jones' are directly affected by the TRUSTEES' adoption of the City of Destin Erosion Control Line ("ECL").

36. The constitutional property rights of STBR's members who own littoral property, along with Alford and Lindsay's constitutional property rights are directly affected by the TRUSTEES' adoption of the Western Walton County Erosion Control Line ("ECL").

37. The City of Destin Erosion Control Line and Western Walton County Erosion Control Line, taken together, form the erosion control line for the 6.9 mile Beach Restoration Project. These two erosion control lines will be referred to collectively as the "ECL."

38. If the Defendants desire to acquire one or more of the littoral property rights from the Individual Plaintiffs and SOB/STBR members who own lit-

toral property, they must do so by instituting eminent domain proceedings.

39. Defendants have not filed any notices or actions for eminent domain for any littoral properties affected by the ECL for the Beach Renourishment Project.

40. Defendants have no intention of filing any eminent domain proceedings to acquire constitutionally protected littoral property rights from the Individual Plaintiffs or SOB/STBR members who own littoral property unless ordered by a court.

COUNT I

DECLARATORY JUDGMENT
The Act, or portions thereof, are Facially Unconstitutional

41. Plaintiffs reallege and incorporate herein by reference the allegations in Paragraphs l-40 of this Complaint as if fully set forth herein.

42. Under this count, Flamingo, Ross, Jones, Alford, Lindsay, SOB, and STBR (collectively "Plaintiffs" in this Count) seek relief.

43. Section 86.011, Fla. Stat., authorizes a party to file a lawsuit seeking a declaratory judgment from a court when a party is in doubt regarding its rights, powers, and privileges.

44. Individual Plaintiffs and SOB/STBR members who own littoral property are in doubt as to their rights, powers, and privileges with respect to their real property and associated vested littoral rights thereto in light of the Act and the Defendants' Beach Restoration Project.

45. The adoption of the ECL and recordation of the same in accordance with Section 161.181, Fla. Stat., by the TRUSTEES will fix a permanent unnatural boundary between the sovereignty bottom lands and the uplands of the Individual Plaintiffs and SOB/STBR members who own littoral property.

46. As a result of the adoption and upon the recording of the ECL, the Individual Plaintiffs and SOB/STBR members who own littoral property will instantly be divested of their constitutionally protected littoral right to receive accretions (along with other rights) and that right (and title to any accreted lands) will be immediately transferred to the Trustees by operation of law.

47. The Trustees will instantly become record title holder to any accreted lands that, prior to the adoption and recordation of the ECL, would have vested with the Individual Plaintiffs and SOB/STBR members who own littoral property.

48. Sections 161.181 and 161.191, Fla. Stat., and the Act as a whole, constitutes a direct physical taking of the Individual Plaintiffs' littoral property rights (as well as those littoral rights of SOB/STBR members who own littoral property), rather than a "regulatory" taking.

49. Section 161.191, Fla. Stat., purporting to eliminate the constitutionally protected littoral property of the Individual Plaintiffs and SOB/STBR members who own littoral property without first requiring the institution of eminent domain procedures violates the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution and the due process clause of Article I, section 9, of the Florida Constitution.

50. Section 161.191, Fla. Stat., which establishes for all time, the permanent boundary line between privately owned upland properties and sovereign submerged lands is patently unconstitutional.

51. Section 161.191, Fla. Stat., which authorizes a permanent line of demarcation between privately owned uplands and sovereign submerged lands can only pass constitutional muster if it mandates the governmental entity to first institute eminent domain proceedings to acquire the upland owners' constitutionally protected property right of accretion. Neither section 161.191, Fla. Stat., nor any other section of the Act requires the governmental entity to acquire the upland property owners' right to accretion by eminent domain.

52. Consequently, section 161.191, Fla. Stat., and the Act unconstitutionally deprives the Individual Plaintiffs and SOB/STBR members who own littoral property of their littoral property rights without full and just compensation in violation of the due process clause of the Fourteenth Amendment to the United States Constitution and the due process clause of Article I, section 9, of the Florida Constitution.

53. SOB and STBR bring this action on behalf of its substantial number of members that own littoral property within the Beach Renourishment Project.

54. An actual, immediate, substantial, and justiciable controversy exists between the parties as to whether Sections 161.141, 161.161, and 161.191, Fla. Stat., and the Act, are constitutional.

55. Accordingly, Plaintiffs are entitled to have their rights, powers, and privileges determined by this Court and to a declaratory judgment pursuant to Chapter 86, Fla. Stat.

WHEREFORE, Plaintiffs are entitled to a judgment declaring that Sections 161.141, 161.161, and 161.191, Fla. Stat. and the Act, are unconstitutional.

COUNT II

DECLARATORY JUDGMENT
The Act, or Portions thereof, are Unconstitutional as-applied by the Defendants

56. Plaintiffs reallege and incorporate herein by reference the allegations in Paragraphs l–40 of this Complaint as if fully set forth herein.

57. Under this count, the Individual Plaintiffs seek relief.

58. Section 86.011, Fla. Stat., authorizes a party to file a lawsuit seeking a declaratory judgment from a court when a party is in doubt regarding its rights, powers, and privileges.

59. The Individual Plaintiffs are in doubt as to their rights, powers, and privileges with respect to their real property and associated vested rights thereto in light of the Act and the Defendants' actions and inactions under the Act.

60. Section 161.191, Fla. Stat., eliminating the Individual Plaintiffs' constitutionally protected littoral property rights without providing due process of law or just and full compensation violates the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution and the due process clause of Article I, section 9, of the Florida Constitution.

61. The Trustees have adopted an ECL, pursuant to section 161.161, Fla. Stat., that traverses the Individual Plaintiffs' properties.

62. The adoption of an ECL and recordation of the same in accordance with section 161.181, Fla. Stat., by the TRUSTEES will fix a permanent unnatural boundary between the sovereignty bottom lands and the Individual Plaintiffs' littoral uplands.

63. As a result of the adoption and upon the recording of the ECL, the Individual Plaintiffs will be instantly divested of their constitutionally protected littoral right to receive accretions and that right (and title to any accreted lands) will be immediately transferred to the Trustees by operation of law.

64. The Trustees will instantly become record title holder to any accreted lands that, prior to the adoption and recordation of the ECL, would have vested with the Individual Plaintiffs.

65. Sections 161.181 and 161.191, Fla. Stat., and the Act as a whole, constitutes a direct physical taking of the Individual Plaintiffs' property rights, rather that a "regulatory" taking.

66. As of the date of filing this amended complaint, neither the TRUSTEES, DEP, DESTIN, or WALTON have instituted any eminent domain proceedings against the Individual Plaintiffs or any other littoral property owner within the Beach Renourishment project pursuant to Section 161.141, Fla. Stat., or any other section of the Act.

67. Section 161.141, Fla. Stat., provides: "If an authorized beach restoration, beach nourishment, and erosion control project cannot reasonably be accomplished without the taking of private property, the taking must be made by the requesting authority by eminent domain proceedings."

68. The failure of the TRUSTEES, DEP, CITY and WALTON to institute eminent domain proceed-

ings as required by Section 161.141, Fla. Stat., is a violation of that state statute.

69. By virtue of their actions to establish and record an ECL, as alleged, the TRUSTEES, DEP, CITY and WALTON, interpret and apply section 161.141, Fla. Stat., and the Act in a manner which excuses them from instituting eminent domain proceedings prior to the establishment and recordation of the ECL. This application of section 161.141, Fla. Stat., and the Act to the Individual Plaintiffs' property is unconstitutional.

70. The TRUSTEES' adoption and recordation of the ECL, without first instituting eminent domain proceedings, will take the Individual Plaintiffs' littoral property rights without full and just compensation violating the due process clause of the Fourteenth Amendment to the United States Constitution and the due process clause of Article I, section 9, of the Florida Constitution.

71. An actual controversy exists between the Individual Plaintiffs and Defendants as to whether Sections 161.161, 161.191 and 161.141, Fla. Stat., and the Act, are constitutional and whether Defendants must provide the Individual Plaintiffs with due process in the form of eminent domain proceedings BEFORE the adoption and recordation of the ECL.

72. Accordingly, the Individual Plaintiffs are entitled to have their rights, powers, and privileges determined by this Court and to a declaratory judgment pursuant to Chapter 86, Fla. Stat.

73. The Individual Plaintiffs have complied with all conditions precedent to instituting this action.

74. The Individual Plaintiffs have exhausted all administrative remedies, to the extent any such remedies exist.

WHEREFORE, the Individual Plaintiffs are entitled to a judgment declaring that Sections 161.141, 161.161, and 161.191, Fla. Stat., and the Act, as-applied by the Defendants, are unconstitutional.

COUNT III

DECLARATORY JUDGMENT
The Act requires the Defendants to institute eminent domain proceedings to acquire constitutionally protected property rights prior to recording the ECL

75. Plaintiffs reallege and incorporate herein by reference the allegations in Paragraphs 1–40 of this Complaint as if fully set forth herein.

76. Under this count, Flamingo, Ross, Jones, Alford, Lindsay, SOB, and STBR (collectively "Plaintiffs" in this Count) seek relief.

77. Section 86.011, Fla. Stat., authorizes a party to file a lawsuit seeking a declaratory judgment from a court when a party is in doubt regarding its rights, powers, and privileges.

78. Individual Plaintiffs and SOB/STBR members who own littoral property are in doubt as to their rights, powers, and privileges with respect to their real property and associated vested rights thereto in light of the Act and the Defendants' actions and inactions under the Act.

79. The Act, in section 161.141, Fla. Stat., states "If an authorized beach restoration, beach nourishment, and erosion control project cannot reasonably be accomplished without the taking of private prop-

erty, the taking must be made by the requesting authority by eminent domain proceedings."

80. There is a bona fide dispute between the parties as to whether Section 161.141, Fla. Stat., requires the Defendants, WALTON and CITY, to institute eminent domain proceedings against the Individual Plaintiffs and SOB/STBR members who own littoral property.

81. Sections 161.181 and 161.191, Fla. Stat., of the Act which establishes and authorizes recording of the ECL, expressly confiscates the "private property" (*i.e.*, littoral right to accretion and right to have their littoral property remain in contact with the water) of Individual Plaintiffs and SOB/STBR members who own littoral property.

82. Accordingly, Defendants are required by Section 161.141, Fla. Stat., to first institute eminent domain proceedings prior to recording the ECL.

83. Defendants have not filed any notices or actions for eminent domain for any littoral properties affected by the ECL for the Beach Renourishment Project.

84. Defendants have no intention of filing any eminent domain proceedings to acquire the constitutionally protected property rights of the Individual Plaintiffs and SOB/STBR members who own littoral property unless ordered by a court.

85. Defendants have adopted the ECL and can record the ECL pursuant to Section 161.181, Fla. Stat., at anytime. Upon recording, the Individual Plaintiffs and SOB/STBR members who own littoral property will be immediately, and by express operation of law, divested of their "private property" (*i.e.*,

littoral right to accretion and right to have their littoral property contact the water).

86. Accordingly, Individual Plaintiffs and SOB/STBR members who own littoral property have a bona fide, actual, present, and practical need for a declaration of their rights.

87. SOB and STBR bring this action on behalf of its substantial number of members that own littoral property within the Beach Renourisment Project.

WHEREFORE, Plaintiffs are entitled to a judgment declaring that Sections 161.141, 161.161, 161.191, Fla. Stat., and the Act, requires the Defendants to institute eminent domain proceedings prior to the recordation of the ECL and to the extent the ECL is recorded prior, to the institution of eminent domain proceedings, Section 161.141, Fla. Stat., and the Act are unconstitutional.

Dated this 3rd day of February, 2005.

[Exhibit A to Amended Complaint intentionally omitted from Respondents' Appendix]

EXHIBIT B [to Amended Complaint]
Stop the Beach Renourishment, Inc.'s Members

Lionel and Tammy Alford
20 Sandy Beach Road, Miramar Beach
R 34-2S-21-42000-019-0010[1]

Janet Frost
30 Sandy Beach Road, Miramar Beach
R 34-2S-21-42000-019-0000

[1] These numbers are the Walton County Parcel Id numbers.

Slade Lindsay
247 Sand Trap Rd., Miramar Beach
R 34-2S-21-42000-019-0011

Suzy Spence
219 Open Gulf St.(Walton Co property)
R 33-2S-21-42180-003-0020

Mark Styslinger
167 Beach Drive E. (Gulf Pines)
R 34-2S-21-42080-009-0130